L. H. E.

Affirmed

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Sharpe

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Submitted Nov. 7. 1876

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~271.~~ 5-1

FRANCIS JEFFREY, ADMINISTRATOR OF WILLIAM L. ZENTMEYER, DECEASED, APPELLANT,

vs.

CHARLES MORAN, TRUSTEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED OCTOBER 16, 1876.

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1 At a regular term of the circuit court of the United States within and for the sixth judicial circuit and southern district of Ohio, begun and held at the court-rooms in the city of Cincinnati on the first Tuesday of October, being the fifth day of that month, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the one hundredth.

Present, the honorable Philip B. Swing, district judge.

Among the proceedings had were the following, to wit:

CHARLES MORAN, TRUSTEE,
vs.
THE CINCINNATI & ZANESVILLE RAILROAD Company. } 1173. In chancery.

Be it remembered that heretofore, to wit, on the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty-nine, came the said complainant, Charles Moran, by Hunter & Dougherty, his solicitors, and filed in the clerk's office of the court aforesaid his certain bill of complaint against the said defendant, clothed in the words and figures following, to wit:

Bill.

To the honorable the circuit court of the United States for the southern district of Ohio, in chancery sitting:

Charles Moran, of the city of New York, and a citizen of the State of New York, brings this his bill of complaint against the Cincinnati and Zanesville Railroad Company, a body corporate, legally constituted and organized by and in conformity to the statutes of the State of Ohio, and having its principal office and place of business in the city of Cincinnati, and within the southern district of Ohio.

2 And your orator, complaining, says that on the first day of April, A. D. 1864, the said defendant, the Cincinnati and Zanesville Railroad Company, being such body corporate as aforesaid, executed and delivered to your orator, Charles Moran and William Scholl, as grantees in trust thereof, its certain mortgage or deed of trust, sealed with its corporate seal, and duly stamped with revenue stamps of the United States properly canceled, as prescribed and required by the statutes of the United States in such cases made and provided, a copy of which said mortgage or deed of trust is herewith exhibited, and your orator prays that the same be taken as a part of this his bill of complaint; that by the procurement of the grantees thereof said mortgage or deed of trust was, in due form of law, recorded in the office of the recorders of deeds in each of the following named counties in the State of Ohio, in which the real and personal property thereby conveyed and mortgaged was situate and employed at the days and times now here stated; that is to say:

In the county of Hamilton, on the 18th day of May, A. D. 1864, at 9 o'clock a. m.

In the county of Warren, on the 27th day of June, A. D. 1864, at 11½ o'clock a. m.

In the county of Clinton, on the 22nd day of July, A. D. 1864, at 3 o'clock p. m.

In the county of Fayette, on the 29th day of July, A. D. 1864, at 3.40 o'clock p. m.

In the county of Pickaway, on the 3rd day of August, A. D. 1864, at 3½ o'clock p. m.

In the county of Fairfield, on the 18th day of August, A. D. 1864, at 2 o'clock p. m.

3 In the county of Perry, on the 29th day of August, A. D. 1864, at 1 o'clock p. m.

And in the county of Muskingum, on the 7th day of September, A. D. 1864, at 11¾ o'clock a. m.

And your orator will exhibit and produce in evidence, at the hearing of this cause, the said original mortgage or deed of trust, with the indorsements thereon by the recorders of said counties of the recording thereof, as aforesaid.

That the said defendant, the Cincinnati and Zanesville Railroad Company, by virtue of the statutes of the State of Ohio in such cases made and provided, was, at the date of the said mortgage or deed of trust, to wit, on the first day of April, A. D. 1864, authorized to borrow money, and to secure the payment thereof by a pledge of its property and income by a deed of mortgage upon its real and personal property, conditioned for the payment of its notes, bonds, or other evidences of indebtedness issued by it therefor. That on the day and year last aforesaid, said defendant, for the consideration recited and set forth in and by the mortgage or deed of trust aforesaid, was indebted in the principal sum of one million and three hundred thousand dollars, as for borrowed money, to be paid on the first day of November, A. D. 1893, with interest thereon at the rate of seven per centum per annum, payable semi-annually, on the first day of May and the first day of November of each year, from and after the first day of November, A. D. 1863; that, as evidence of its said indebtedness, said defendant made and issued its certain bonds or obligations in writing in the aggre-

4 gate for the said principal sum of one million three hundred thousand dollars, to wit, eleven hundred bonds numbered consecutively from number one (1) to number eleven hundred (1100) inclusive, for the sum of one thousand dollars each, and four hundred bonds numbered consecutively from number one (1) to number four hundred (400) inclusive, of five hundred dollars each, all maturing at the time above named, and all bearing interest at the rate above named, from the date above named, payable semi-annually, as aforesaid. The principal and interest thereof being, by the terms thereof, payable at the American Exchange Bank in the city of New York; warrants or coupons for the interest accruing on each of said bonds being attached thereto, and numbered to correspond with the number of the bonds severally. Said bonds and coupons severally being made payable to your orator, Charles Moran and William Schall, the grantees of said mortgage or deed of trust, or bearer, to whom the same, together with said mortgage or deed of trust, were delivered, to be transferred or negotiated to the parties and persons entitled thereto according to the terms and recitals in said mortgage or deed of trust contained, as by an endorsement on each of said bonds signed by said trustees more particularly and at large appears, a copy in blank of which said bonds, coupons, and endorsement appears and is set forth in said mortgage or deed of trust, and the copy thereof herewith exhibited as aforesaid.

That the said mortgage or deed of trust, as by the terms and conditions thereof fully appears, as aforesaid made to secure the payment of the said bonds and interest-coupons, and was delivered by the said defendant to the said grantees in trust for that purpose; and the said grantees in trust afterwards, as of the dates thereof and for the

5 consideration aforesaid, to wit, as and for a loan of money equal in amount to the principal sum specified in each of said bonds for and during the term and period of time therein and thereby indicated, by the authority and direction of the defendant, delivered the said bonds and coupons to the parties and persons entitled thereto as recited and set forth in said mortgage or deed of trust, and they, and those claiming the same under them, severally, by reason of the premises, became and were and are legally entitled as the holders of said bonds and coupons, to have and receive from the defendant payment thereof in money, according to the terms and conditions thereof, and as a security therefor are entitled to the benefit of said mortgage or deed of trust, to be enforced in due course of law.

That, as fully appears by the copy thereof exhibited herewith, as aforesaid, there was and is granted and conveyed by said mortgage or deed of trust, for the purposes aforesaid, to your orator and the said William Schall, and to the survivor of them, and to the heirs of such survivor, all of the railroad, other property and franchises which had formerly belonged to the late Cincinnati, Wilmington and Zanesville Railroad Company, and which had been previously sold to the said Charles Moran, and conveyed to him by David Hull, as master commissioner in chancery, as in said mortgage or deed of trust is recited, and which had been conveyed by the said Charles Moran to the defendant, the grantor of said mortgage or deed of trust, as is further recited and set forth therein, the same being more fully and particularly described as follows, that is to say: "The entire property and road of the said Cincinnati, Wilmington and Zanesville Railroad Company, lying within and between the town of Morrow and the city of Zanesville in the State of Ohio, including the right of way held and owned by the

6 said company, whereon that part of its road, as aforesaid, is constructed and in use, and the lands occupied thereby, by whatever right the same may have been holden by said company, together with the superstructure and tracks thereon, and all bridges, viaducts, culverts, fences, depot grounds and buildings thereon, and all other franchises, rights and privileges of said railroad company, including the right and franchise of said company to be and act as a corporation, and also including as a part of said premises all engines, locomotives, cars of every description, rolling-stock, turn tables, water stations, warehouses, and lots and lands used in operating said road, or in connection therewith, and owned and held for that purpose; and all tools, implements, materials and supplies, and all shops and engine houses, owned and in use in operating said road, as all the same were held, owned, and used and employed by said company, with all accessions thereto, at the time of the sale thereof, as the said road, property and franchises had been set forth and described in the various orders and decrees in said mortgage or deed of trust mentioned. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and all the estate, right, and title, interest, property, possession, claim and demand whatsoever of the said defendant, the party of the first part, grantor of the said mortgage or deed of trust, of, in and to the same, and any and every part thereof, with the appurtenances. To have and to hold said granted, bargained and sold premises, and the rights, privileges

7 and appurtenances to the same belonging, by the same title and right by which the same were holden by the said Cincinnati, Wilmington and Zanesville Railroad Company at the time of the sale

thereof to the said Charles Moran, and by which the said grantor, the defendant, was vested therewith, at the date of said mortgage or deed of trust to the said Charles Moran and William Schall, or the survivor of them, and the heirs of such survivor, in trust for the uses and purposes therein expressed and contained, and subject to the conditions thereinafter mentioned," and which are to the effect following:

Item first. That the possession, use and occupancy of said granted and sold premises should remain with and be held by the defendant, to be operated and carried on by it; and the proceeds of the business thereof received and held, used and applied by it, at its discretion, except as therein otherwise provided, so long as no default should be made in the payment of the installments of interest upon the bonds of said company as the same should mature, or in payment of the principal of said bonds at the maturity thereof; provided, however, that it should be the duty of said company, before declaring and paying any dividend to the stockholders thereof, to apply so much of the earnings of the company, or the proceeds of its business, as might be necessary, to fully pay the current expences, and all balances in arrear of prosecuting and carrying on its business, and all taxes that might be legally assessed against it, the necessary expenses of keeping its road, rolling stock and appurtenances in repair and proper condition for use; the necessary expenses incurred for works of reconstruction, and to provide for the payment, by setting apart a fund specifically for that use, to be actually
8 deposited with the proper agency, of all arrears that might, at the time of declaring such dividend, be due for interest upon the bonds aforesaid, and for the payment of the next succeeding installment of interest thereon to become due thereafter; and provided further, that the declaring or paying of any dividends upon stock, by said company, inconsistent with said proviso, should be deemed a forfeiture of the condition of said mortgage or deed of trust, and of the right of said company further to continue in the possession and use of said granted and sold premises, and should entitle said grantees in trust, or the successor of them, to enter into and take possession thereof, and to use, manage, carry on and dispose of the same, as provided in case of default in other particulars.

Item second. The said company, being in the possession, use and occupancy of said granted and sold premises, should have power and authority to use, apply and pay the money and income arising from the business aforesaid in payment of the expenses, both current and in arrear, of prosecuting and carrying on its said business and in payment of taxes and necessary repairs and works of reconstruction aforesaid; and might sell and dispose of all such parts of the property conveyed by said mortgage or deed of trust, as from deterioration or other causes might not be necessary or fit for use in prosecuting said business, or in operating said road, and apply the proceeds thereof to the uses and purposes aforesaid; but not to divert the same to any other use, or so as to impair the value of the property so mortgaged as aforesaid. And it was expressly reserved and limited that it should not be competent for said company in the prosecution of said business to create any lien by contract or otherwise upon any of the property so mortgaged, that should have any priority over the lien thereof; and that the directors of said company in prosecuting said business, applying funds, and disposing
9 of parts of the property, as aforesaid, for all the purposes of said mortgage or deed of trust, should be deemed to be acting in trust for the use of the grantees thereof, and of all persons beneficially interested in the security intended to be thereby effected; and that any breach

of such trust should be a breach of the condition upon which said company was to retain the possession and use of said mortgaged premises.

Item third. If default should be made in the payment of any installment of interest, or any part thereof, on presentation of the proper coupon or coupons therefor, at the time and place at which they were lawfully payable, and should remain in default for three months thereafter; or in the payment of the principal of the said bonds at the maturity thereof at the place of payment therein named; or should fail to pay the taxes legally assessed against said company within such time as might be necessary to prevent the accumulating of penalties; or if any of the conditions of said mortgage or deed of trust before mentioned should be violated on the part of said company or its directors, then, and in either such case, that the entire principal of said bonds should for all purposes whatever become due and payable, and payment thereof might be enforced accordingly, in due course of law, with the interest thereon. And that in no event should any preference be given in the distribution of the proceeds arising under said mortgage, whether of the income to be produced by the prosecution of the business of said company before a sale should be effected of said granted and sold premises, or from such sale; and that all such proceeds should, after defraying all proper costs and expenses, be divided pro rata amongst the holders of the bonds and interest coupons at maturity at the time of making said dividend. And in the event of any default of payment, or breach of any of the conditions aforesaid, that the said grantees should have the power, and it was and is by the said mortgage or deed of trust made their duty, upon the written request of the holders of not less than seven hundred thousand dollars of said bonds and overdue coupons, estimated at the par value thereof, to enter into and take possession of said granted and sold premises, together with all additions thereto that might, at the time of so doing, be made thereto, or belong to said company, and by themselves or their agents and employees to operate and carry on the business of said railroad and all additions thereto; and in so doing to complete any engagements entered into by said company remaining to be completed for transportation upon and repairs and reconstruction of said railroad; and the proceeds thereof remaining, after defraying all charges and expenses to be incurred in so doing, to pay, distribute, and apply pro rata as aforesaid to the holders of the bonds aforesaid and the coupons to the same belonging which shall be due and unpaid. That it should be the duty of said grantees in trust, after taking possession as aforesaid, or in case of default as aforesaid, and upon the written request of the holders of not less than seven hundred thousand dollars of bonds and coupons estimated as aforesaid, with or without such possession taken, to proceed by public sale, at a time and place to be published at least thirty days before the day of sale in at least fifteen consecutive issues of at least two daily newspapers of good circulation, printed in each of the cities of New York, Philadelphia, Baltimore, and Cincinnati, to sell to the highest bidder for cash, to be paid according to the conditions of said sale, at such reasonable time or times to admit of capitalists making the necessary arrangements for the payment thereof, and upon such terms of security for such payment as should be designated in such notice, the said granted and sold premises, with all such additions, extensions, and improvements as, at the time of such sale, should have been made thereto, or be in progress of being made by said company, including all rolling-stock and property of every kind and description which should belong to said company and have been provided, or in-

tended to be used by said company in carrying on its railroad, together with the franchises of said company, including its franchise to be and act as a corporation; and upon such sale being perfected and payment of the purchase money, to deliver to the purchaser or purchasers a deed of conveyance, transferring and conveying to and vesting in them all the right and title to the premises so to be sold, which before and at the time of said sale was vested in said company, but free and clear of any incumbrance thereon by virtue of said mortgage or deed of trust, or by any contract or conveyance, mortgage or lien of any kind or description that should at any time thereafter be made, executed, or suffered by said company or that then might exist upon the same, as in this item of the conditions of said mortgage or deed of trust is more fully specified.

And further, it was and is provided, in said item third of said conditions that, if for any cause the said grantees of said mortgage or deed of trust should deem it more fitting or expedient to invoke the aid of a court of justice having competent jurisdiction to enable them to execute the powers and trusts thereby created in the management
12 and sale of the premises so authorized to be sold and managed as aforesaid than to execute the same with such aid, it should be competent for them to proceed accordingly, and in such case to execute their said powers and trusts in conformity with what should be ordered and decreed by such court; and that in either mode of procedure they should be entitled to retain out of the proceeds to arise, and which shall remain after defraying all necessary and proper charges and expenses, including fees of legal counsel and attorneys retained and employed by them, a just and reasonable compensation for their services in the execution of said powers and trusts; and the residue of said proceeds should be equitably divided, so that so much thereof as should, in equity, result from that part of said premises so to be sold which was conveyed by said mortgage or deed of trust, namely, the railroad of said company within and between the city of Zanesville, in the county of Muskingum, and the town of Morrow, in Warren County, and all and singular the other property and franchises which were conveyed by the master commissioner to Charles Moran, as above described, with all additions and improvements that might thereafter be made thereto, but not including any extension beyond those points that should be made of said railroad, should be ascertained in the most equitable way practicable, the intention being to secure a sale of the entire road and all property and franchises connected and used, or provided to be used therewith, as an entirety, if, in any event, a sale under the powers thereby granted should become necessary; and that the equitable part of said proceeds, to be ascertained as aforesaid, should be distributed and applied in payment pro rata of the principal
13 of the said bonds and unpaid interest coupons due thereon as aforesaid, intended to be secured by said mortgage or deed of trust until the same shall be fully paid; and the residue of said equitable part of said proceeds, together with the residue of the proceeds of said sale arising from all other parts of said premises to be sold, should be paid to said company, or to such claimants and creditors of said company as might legally and equitably be entitled thereto; and if the equitable part of the proceeds to be applied thereto as aforesaid should not be adequate to fully pay the principal and interest of the bonds intended to be secured by said mortgage or deed of trust, the holders of the unpaid residue thereof should be entitled to participate in the distribution of the proceeds otherwise arising as aforesaid as might be lawful, due regard being had to priorities of lien, if any

shall exist in favor of other claimants against the same; provided, nevertheless, and it was and is expressly reserved in and by the said item third, that all funds that might be realized by said company upon the credit of the company in any form, or by the sale of preferred stock for the purpose of completing the line of its road within the points of termini thereof, or to extend the same to other points or places; or to increase or improve the rolling-stock thereof, should be strictly limited, in the expenditure thereof, to said special uses; and no part of the property or proceeds thereof produced by the expenditure of such funds should be applied in payment of the bonds or coupons secured by said mortgage or deed of trust, until the debts incurred in the procurement of said funds should be fully paid and discharged. And it
14 was and is further declared by said item third, that payment of the purchase money to said trustee or trustees making said sale, by the purchaser or purchasers, should be valid, and that the purchaser or purchasers should not be responsible in any way for the proper application thereof; provided, however, that unless requested in writing by such amount in value of bondholders as above named to enter into and take possession of said premises, or to proceed to make sale thereof by reason of such default as aforesaid, the said trustees should not be required to do so; and in executing their trust and powers aforesaid in good faith, without fraud, they should not be held personally liable for any loss, accident, or injury that might happen or be sustained by any person or persons; but the same, so far as legally chargeable to or against them, or any of them, should be deemed a part of the expenses incident to the execution of said trust and powers, and be paid or refunded out of the trust property or the proceeds thereof, and they have the right to retain therefor accordingly.

Item fourth. That in case of the death or disability of either the said Charles Moran or William Schall, before the full execution of the trusts and powers aforesaid should be executed, the complete and full execution thereof should devolve upon the survivor, with full power and authority to execute the same as if he had been constituted the sole grantee therein, and in the event of the death or disability of both of said grantees before said trust and powers should be fully executed, the power to fully execute the same should devolve upon such person or persons as might be constituted or appointed by any court of competent jurisdiction in a proper case or proceeding to be instituted for that
15 purpose, by or at the instance of any bondholder or person having an interest in the execution of said trusts and powers, and in such case the trustee or trustees so constituted should execute the said trusts and powers in conformity with the orders and instruction of such court and subject to confirmation, if so required, by said court; and in case of the death or disability of the person or persons so to be appointed, the vacancy might be filled, and so again continuously from time to time, as often as said trust might become vacant, in like manner, with like powers to the appointee, until said trusts and powers should be fully accomplished.

Item fifth. That if the said defendant, or its successors or assigns, should well and truly pay to the holders of the bonds and coupons aforesaid, as the same should mature and become due, or at any time before a sale should be made in pursuance of the powers aforesaid, with interest after maturity, and should pay and discharge all expenses incurred by the trustees, with a view to the execution of said trusts and powers, with a just compensation to them for their services; all of which payments after default to be made to said trustees or their successor or

successors for the use of the parties entitled thereto to be distributed by said trustees or their successors, without any responsibility touching the same upon said company, at the proper expense of the distributees, including a just compensation to said trustees or their successors for their services and expense, then and in such case said mortgage or deed of trust should become void and inoperative, and if possession of the premises or any part thereof should have been taken under it the same should be immediately restored upon such payment being made to said company, together with all money, credits, and effects that might remain in the hands of the trustees, and which, in equity, should belong to said company.

16 Your orator further says and avers that he and the said William Schall accepted said trust, and in part execution thereof received of said defendant the said two series of its said bonds numbered and described in and secured by said mortgage or deed of trust, amounting, in the aggregate, to one million three hundred thousand dollars of principal, with full sets of interest warrants or coupons thereto attached, for the use of the owners and holders of the first-mortgage bonds to a like amount of the said late Cincinnati, Wilmington and Zanesville Railroad Company, to be negotiated and delivered in substitution of said last-named bonds to the said owners and holders thereof, as recited and set forth in said mortgage or deed of trust, and as shown by endorsement on each of said bonds hereinbefore referred to.

That your orator and his said co-trustee, William Schall, in further part execution of said trust, negotiated and exchanged all of said bonds and coupons, and delivered the same in substitution of said other bonds, as aforesaid, and the same, except so far as a part of the said interest coupons have been paid and retired by the defendant, are outstanding and unpaid in the hands of bona-fide owners and holders thereof. That after part execution of said trust as aforesaid, his said co-trustee, William Schall, removed out of the United States, and is now permanently domiciled in Europe, and by reason thereof has become and is disabled to further unite in the execution of said trust with your orator; and he is advised and charges that by reason of the said disability of the said William Schall the duty and obligation to further and fully execute said trust, and the powers incident thereto, are devolved upon your

17 orator alone, and as sole trustee; and he avers and charges that, although the defendant has paid and retired such of the said interest warrants or coupons attached to said bonds as were presented for payment, and were due and payable on and prior to the first day of November, A. D. 1866, yet the defendant has not made any further payment of the interest accrued on said bonds, or any of them, since the day and year aforesaid, although the several warrants or coupons therefor were and have been duly presented for payment at the maturity thereof, and at the place of payment therein designated; nor has the said defendant, at the maturity of the said coupons so remaining unpaid, as aforesaid, or at any other time or times, provided funds for the payment thereof, or any part of the same, but has been and is in default by the non-payment of the several installments of interest which have fallen due on said bonds on the first days of May and November of each of the years A. D. 1867–1868, and said default having remained and continued during a period greatly more than thirty days after the same occurred, the whole amount thereof still being and remaining unpaid. And your orator is advised, avers, and charges that, by reason of said default the principal sum of said bonds and the interest accrued and unpaid thereon, and accruing for all purposes in relation to enforc-

ing the conditions of the said mortgage or deed of trust, are, by the terms thereof, due and payable, and that the holders of said bonds and coupons to the sum and amount of eight hundred thousand dollars of principal of said bonds have requested your orator in writing,
18 in his said capacity as trustee, to proceed to control the possession and use and occupancy of said mortgaged premises, with all additions and accessions thereto made by the defendant, for the use and benefit of the holders of the bonds and unpaid coupons secured by said mortgage or deed of trust; and further, by the aid of judicial proceedings or otherwise, to cause said mortgaged premises, with the additions and accessions thereto aforesaid, to be sold and disposed of pursuant to and in virtue of the said mortgage or deed of trust, and the proceeds to be applied in payment of said bonds and coupons.

Your orator is advised and charges that, although full power is conferred upon him in view of the facts and circumstances herein above set forth to take possession of said railroad and premises, and to operate and carry on the same, and to sell and dispose of the same, and to apply the proceeds as directed by the conditions of said mortgage or deed of trust, without judicial aid; yet, there are involved in the exercise of said powers, and in executing and carrying into effect the trusts and duties so devolved upon him, many important and difficult questions, which he cannot safely to himself or to other parties interested, assume to decide or to settle and determine, without the aid, direction and instructions of your honorable court in chancery sitting. That the said defendant, by its corporate officers, agents and employees, is in possession of the said railroad, property and franchises, and is engaged in operating and carrying on the usual business of a railroad, in transporting passengers and freight of all kinds, and in procuring, using and consuming all necessary supplies therefor, and in the receiving and disbursing, for
19 these purposes, the proceeds of said business; and that any material interference with the current progress of said business, and the management thereof by the agency of said corporate officers, and the agents and employees to be employed by them, so long as they continue to do the same honestly and in good faith, and with proper economy, would tend to the injury and prejudice of parties and persons interested in the premises.

Wherefore your orator prays the order of the court in the premises, empowering and authorizing the said corporate officers of the defendant, subject to such order and regulations as to your honorable court shall seem equitable and to such further order and direction as shall be made herein from time to time, to continue to operate and carry on said railroad, and the business generally of the defendant, for the use and benefit of the trust aforesaid in the hands of your orator until a sale of said premises in pursuance of the decree of the court for that purpose to be made herein can be effected, or till otherwise ordered, subject to such requirement to account, from time to time, as by the court shall be ordered.

And your orator, in further consideration of the premises, prays your process of subpœna against the said defendant, the Cincinnati and Zanesville Railroad Company, commanding and requiring it, within and according to the rules of your honorable court, to appear in and before your honorable court, and full, true, and direct answer to make to all and singular the allegations in this your orator's bill of complaint contained, and particularly whether it did not make, execute, and
20 deliver to the said grantees in trust the said mortgage or deed of trust a copy of which is herewith exhibited, and the bonds with

coupons attached as herein alleged, charged and set forth? Whether said mortgage or deed of trust was not procured to be recorded in the several counties herein alleged at the days and times herein stated and set forth? Whether said bonds and coupons were not negotiated by said trustees and delivered as ordered and directed by the defendant, to bona fide holders thereof, upon and for the consideration in said mortgage or deed of trust specified? Whether said bonds and interest coupons thereto attached or originally belonging thereto are not outstanding in the hands of bona fide holders thereof, except as herein above stated and set forth in regard to the payment of a part of said coupons? or, if otherwise, in any respect or particular, to set forth and specify wherein and how differently. Whether default has not been made by it in the non-payment of the interest on said bonds, as charged, or how otherwise? Whether the whole amount of the principal of said bonds and overdue coupons, except as aforesaid, are not unpaid, or how otherwise?

And upon the hearing, may it please your honorable court to find the equity of the cause to be with your orator, and to cause an account to be taken of the amount of principal due and unpaid upon said bonds, and of the said unpaid interest-coupons; with the interest accruing and accrued thereon to the time of said hearing, and thereupon to order, adjudge, and decree that, unless the whole amount of the sum or sums so to be found to be due, with interest to such further time as the same shall remain unpaid, be paid within a day or time to be named and
21 fixed for that purpose, said mortgaged premises, with all additions, improvements, and accessions thereto, be appraised and sold either by your orator as trustee as aforesaid under the order and direction of the court, or by such other commissioner or agency as by the court shall be constituted for that purpose, and subject to be confirmed by the court. And your orator prays that the purchase-money to be produced by said sale, and by the business to be carried on pending the proceedings in this cause as aforesaid, remaining after the payment of all legal and equitable expenses, charges, and liens to be ascertained under the order of the court, having priority over the claims in behalf of the holders of said bonds and coupons, be paid to your orator, to such amount as shall be necessary to fully pay, liquidate, and satisfy the same, to be applied in payment thereof by him.

And may it please your honorable court to grant to your orator such other and further relief in the premises as shall pertain to equity and justice, and enable him to fully and properly execute the powers and trusts so conferred upon him as aforesaid.

HUNTER & DOUGHERTY,
Solicitors for the Complainant.

With which said bill of complaint was filed a copy of a mortgage, clothed in the words and figures following, to wit:

Mortgage.

To whom it may concern:

Be it known that at a judicial sale thereof, under a decree of the circuit court of the United States for the southern district of Ohio, rendered in a cause in chancery, pending in said court, wherein
22 George S. Coe is complainant and the Cincinnati, Wilmington and Zanesville Railroad Company and others are defendants, Charles Moran became the purchaser of the railroad, other property

and franchises of the said Cincinnati, Wilmington & Zanesville Railroad Company, and became vested with the legal title thereof, by a deed of conveyance in fee-simple, bearing date the 12th day of March, A. D. 1864, made and delivered to him by David Hull, receiver and special master commissioner in said cause, in execution of the orders and decree of said court in said cause duly made and entered, to the record whereof in said court remaining reference is here made for all of the details and particulars; that said purchase by the said Charles Moran was made and said deed of conveyance received by him in trust for the use and benefit of such of the creditors and stockholders of the said Cincinnati, Wilmington and Zanesville Railroad Company as should become interested therein upon certain specific terms and conditions, and become organized as a body-corporate under the charter of the said Cincinnati, Wilmington and Zanesville Railroad Company, or otherwise the franchises of which company, including the franchise to be and act as a corporation, became vested in said Charles Moran, in trust as aforesaid, by virtue of the decree of sale, and his purchase and the deed of conveyance aforesaid to him with the said railroad and other property of said company; that the beneficiaries of said trust, on the 10th day of March, A. D. 1864, convened in meeting at Cincinnati, became organized as a body corporate under the charter and corporate franchises aforesaid by the corporate name of the Cincinnati and Zanesville Railroad Company, and thereafter and after
23 delivery to him as aforesaid of the master commissioner's deed the said Charles Moran, in execution of his said trust, and in conformity with resolutions and requirements of said beneficiaries made and adopted at their said meeting, made and executed his deed of conveyance to the said the Cincinnati and Zanesville Railroad Company as grantee thereof, dated the 12th day of March, A. D. 1864, and delivered the same as an escrow to be absolute on the delivery of this deed and the bonds thereby secured as hereinafter mentioned to the grantees in trust thereof, thereby conveying to the said company the said railroad, other property and franchises, so conveyed to him as aforesaid. That by the order and decree of the court aforesaid in the cause aforesaid, the residue of the purchase money bid by said Charles Moran at the receiver's sale thereof for said railroad, other property and franchises, and the residue of the proceeds of the business of said railroad in the hands of the receiver remaining after paying the legal costs, charges, and expenses, are to be applied in payment upon the first-mortgage bonds of the said railroad company, and coupons thereon pro rata outstanding and due and unpaid on the 1st day of November, A. D. 1863, and the beneficiaries under the said purchase by the said Moran holding such first-mortgage bonds, by the terms and conditions of said trust were in equity liable to pay the purchase money bid by said Charles Moran upon his said purchase. That by arrangement and as a part of the terms and conditions of said trust, the holders of such first-mortgage bonds who are beneficially interested in said trust, waive their right to receive the dividend that would otherwise accrue to them upon the principal of their said bonds, and surrender the same to the
24 said newly organized body corporate, the said the Cincinnati and Zanesville Railroad Company, which said company, in consideration of the premises, has assumed the obligation and liability to pay and refund the purchase money bid by the said Charles Moran as aforesaid, and is entitled to hold and retain to its own use the dividends so accruing as aforesaid to such beneficiaries upon their said bonds and unpaid coupons; and the said body corporate, in further consideration

of the premises, has also assumed to pay to said beneficiaries holding first-mortgage bonds of said Cincinnati, Wilmington and Zanesville Railroad Company the principal sum of their said bonds on the first day of November, A. D. 1893, at the American Exchange Bank, in the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually, on the first day of May and the first day of November in each year, after the first day of November, A. D. 1863, until the principal shall be paid at the said American Exchange Bank; and to secure the payment thereof to be made as aforesaid, the said the Cincinnati and Zanesville Railroad Company has agreed to execute its bonds corresponding in the numbers and amounts thereof severally with the numbers and amounts of the bonds of the said Cincinnati, Wilmington and Zanesville Railroad Company, for which they are to be substituted as hereinafter named, and payable with interest as to time and place as above named, which bonds being duly executed by said company shall be delivered by it with this deed to the grantees in trust thereof, and shall by them be delivered to such of the holders of the said first-mortgage bonds of the said Cincinnati, Wilmington and Zanesville Railroad Company as shall be entitled thereto as beneficiaries under the trust of the said purchase by the said Moran, and who shall
25 at the same time deliver to the grantees in trust of this deed the bond or bonds of said last-named company, corresponding in amount with the bond or bonds to be delivered to him or them by the said grantees in trust—the said bonds to be so delivered to said grantees in trust to be held by them for the use of the holder or holders of the new bonds, so to be delivered in substitution therefor as aforesaid, and remain secured upon the said railroad, other property, and franchises conveyed by the said Charles Moran as herein above recited to the grantor of this deed, as reserved in the said deed of the said Charles Moran to be enforced upon default of payment of the principal or interest of the bonds secured by this deed and not otherwise, and in the mode and manner herein provided or as may otherwise be equitable.

Also be it further known that the said the Cincinnati and Zanesville Railroad Company, in consideration of the premises and for the purpose of effectuating on its part the terms of arrangement and agreement aforesaid with such of the holders of the said first mortgage bonds of the said Cincinnati, Wilmington and Zanesville Railroad Company as are or may be entitled as *as* beneficiaries under the said purchase of the said Charles Moran, has made and concurrently with the delivery of this deed doth deliver to Charles Moran and William Schall, the grantees in trust of this deed, the bonds of said company, amounting in the aggregate to the sum of $1,300,000, that being the aggregate amount of the first-mortgage bonds of the said Cincinnati, Wilmington and Zanesville Railroad Company, severally bearing date the first day of April, A. D. 1864, and payable, as before recited, on the first day of November, A. D.
1893, at the American Exchange Bank in the city of New York,
26 with interest at the rate of seven per centum per annum, payable semi-annually, at the same place, on the first day of May and first day of November in each year, after the first day of November, A. D. 1863, interest warrants corresponding in date and number with the several bonds being annexed thereto for each installment of interest accruing thereon to the maturity thereof, of which bonds eleven hundred, numbered consecutively from one to eleven hundred inclusively, are each for one thousand dollars, and four hundred thereof, numbered consecutively from one to four hundred inclusively, are each for five hundred dollars; all of which said bonds are in the form following:

UNITED STATES OF AMERICA. STATE OF OHIO.
THE CINCINNATI AND ZANESVILLE RAILROAD COMPANY.

No. . First-mortgage bond. $.

The Cincinnati and Zanesville Railroad Company, a body corporate in the State of Ohio, for the consideration mentioned in the mortgage of said company securing the payment of this obligation with others therein specified, amounting in the aggregate to the sum of $1,300,000, hereby obligates and binds itself to pay to Charles Moran and William Schall, the grantees in trust of said mortgage, or to the bearer hereof, dollars of the American Exchange Bank in the city of New York, on the first day of November, A. D. 1893; and interest thereon at the rate of seven per centum per annum, semi-annually, on the first day of May and the first day of November, of each year, after the first day of November, A. D. 1863, until the said principal sum shall be paid,
27 on presentation of the interest warrants hereto annexed at the said American Exchange Bank. Said company also covenants that no other mortgage shall be made or given by it upon the property covered by the mortgage above mentioned, so long as this obligation remains unpaid, except for the purpose of extending its road to Cincinnati or otherwise, and in no event shall any stockholder in said company be individually liable for the payment of the principal or interest of this bond or any part thereof. This bond shall not become obligatory until authenticated by a certificate endorsed thereon signed by the trustees.

In witness whereof the said company has caused its corporate seal to be hereto affixed, and the same to be signed by its president; and has caused the coupons hereto annexed to be executed with the name of secretary thereto engraved.

President.

COUPON.

The Cincinnati and Zanesville Railroad Company will pay to the holders hereof dollars, on the first day of , 18 , at the American Exchange Bank, in the city of New York, on presentation hereof, being the interest due on that day on its bond No. , secured by the first mortgage on its road.

April 1, 1864.

By order of the board.

Sec'y.

INDORSEMENT.

The within bond is secured by a mortgage delivered by said company to us, dated April 1, 1864, on the line of its road from Morrow to Zanesville in the State of Ohio, with its other property, income, and franchises, in trust for the benefit of the holders of this bond and
28 others of similar tenor to an amount not exceeding $1,300,000, the same being the first mortgage thereon, and in case of any default in the payment of the interest or principal of said bonds, confers upon us power, after three months from the time of such default, if payment be not then made, to take possession of the mortgaged premises and to sell the same, with, or without, judicial proceedings, or to operate the same for the benefit of the bondholders, and other powers specified

therein in detail in regard to the execution of said trust. The delivery of the entire issue of said bonds is made by us for the consideration mentioned in said mortgage, being in substitution for the first mortgage bonds of the Cincinnati, Wilmington and Zanesville Railroad Company, secured on the same property by a former mortgage, which original bonds are deposited with us for the exclusive benefit of the holders of this issue.

New York, , A. D. 1864.

Trustees.

Now, therefore, be it known that the said The Cincinnati and Zanesville Railroad Company in consideration of the premises and of one dollar to it in hand paid by Charles Moran and William Schall, the receipt whereof is hereby acknowledged, doth grant, bargain, sell, and convey, assign and transfer unto the said Charles Moran and William Schall, and to the survivor of them, and to the heirs of such survivor, all of the said railroad, other property and franchises conveyed as above mentioned by the master commissioners to the said Charles Moran and by him to the said grantor of this deed, late the property and fran-
29 chises of the said Cincinnati, Wilmington and Zanesville Railroad Company, and described more particularly as follows:

The entire property and road of the said Cincinnati, Wilmington and Zanesville Railroad Company lying within and between the town of Morrow and the city of Zanesville in the State of Ohio, including the right of way held and owned by the said company, whereon that part of its road as aforesaid is constructed and in use, and the lands occupied thereby, by whatever right the same may have been holden by said company, together with the superstructure and tracks thereon, and all bridges, viaducts, culverts, fences, depot-grounds and buildings thereon, and all other franchises, rights, and privileges of said railroad company, including the right and franchise of said company to be and act as a corporation, and also including as a part of said premises all engines, locomotives, cars of every description, rolling-stock, turn-tables, water stations, warehouses, and lots and lands used in operating said road or in connection therewith and owned and held for that purpose, and tools, implements, materials and supplies, and all shops and engine-houses owned and in use in operating said road, as all the same were held, owned, used, and employed by said company, with all accession thereto at the time of the sale thereof, as the said road, property, and franchises have been set forth and described in the various orders and decrees hereinbefore mentioned, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first
30 part of, in, and to the same and any and every part thereof, with the appurtenances. To have and to hold said granted, bargained, and sold premises, and the rights, privileges, and appurtenances to the same belonging, by the same title and right by which the same were holden by the said Cincinnati, Wilmington and Zanesville Railroad Company at the time of the sale thereof to the said Charles Moran, and by which the said grantor of this deed is vested therewith at the date of these presents, to the said Charles Moran and William Schall, or the survivor of them, and the heirs of such survivor, in trust for the uses

and purposes hereinafter expressed and contained, and subject to the conditions hereinafter mentioned; that is to say:

Item first. The possession, use, and occupancy of said granted and sold premises shall remain with and be held by the said Cincinnati and Zanesville Railroad Company, and said railroad be operated and carried on by said company, and the proceeds of the business thereof be received, held, used, and applied by said company at its discretion, except as herein otherwise provided, so long as no default shall be made in the payment of the installments of interest upon the bonds of said company, as the same shall mature, hereinabove mentioned, or in the payment of the principal of said bonds at the maturity thereof: Provided, however, That it shall be the duty of said company before declaring and paying any dividend to the stockholders thereof to apply so much of the earnings of said company or the proceeds of its business as may be necessary for those purposes to fully pay the current expenses and all balances in arrear of prosecuting and carrying on its business, and all taxes that may be legally assessed against said company; the necessary expenses of keeping its road, rolling-stock, and appurtenances
31 in repair and proper condition for use; the necessary expenses incurred for works of reconstruction, and to provide for the payment, by setting apart a fund specifically for that use, to be actually deposited with the proper agency, of all arrears that may, at the time of declaring such dividend, be due for interest upon the bonds aforesaid, and for the payment of the next succeeding installment of interest thereon, to become due thereafter, and the declaring or paying of any dividend upon stock by said company inconsistently with this proviso shall be deemed a forfeiture of the condition of this deed and of the right of said company further to continue *further* in the possession and use of the said granted and sold premises, and shall entitle the grantees in trust hereof, or the successor of them, to enter into and take possession thereof, and to use, manage, carry on, and dispose of the same as herein provided in case of default in other particulars.

Item second. The said company being in the possession, use, and occupancy of said granted and sold premises shall have power and authority to use, apply, and pay the money and income arising from the business aforesaid in payment of the expenses, both current and in arrear, of prosecuting and carrying on its said business, and in payment of taxes and necessary repairs, and works of reconstruction aforesaid; and may sell and dispose of all such parts of the property conveyed by this deed as, from deterioration or other cause, may not be necessary or fit for use in prosecuting said business or in operating said road, and apply the proceeds thereof to the uses and purposes aforesaid; but not to divert the same to any other use, or so as to impair the value of the property hereby conveyed as a security for the purposes herein expressed. And it is hereby expressly reserved and limited that it
32 shall not be competent for said company, in the prosecution of said business, to create any lien by contract or otherwise upon any of the property hereby conveyed that shall have priority over the lien of this deed; and the directors of said company, in prosecuting said business, applying funds, and disposing of any part of the property as aforesaid, for all the purposes of this deed, shall be deemed to be acting in trust for the use of the grantees and all persons beneficially interested in the security intended to be hereby effected; and any breach of such trust shall be a breach of the condition upon which said company is to retain the possession and use of said granted and sold premises.

Item third. If default be made in the payment of any installment of interest or any part thereof on presentation of the proper coupon or coupons therefor, at the time and place at which they are lawfully payable, and shall remain in default for three months thereafter, or in the payment of the principal of the bonds aforesaid, at the maturity thereof, at the place of payment therein named, or shall fail to pay all taxes legally assessed against said company within such time as may be necessary to prevent the accruing of penalties; or if any of the conditions of this deed hereinbefore mentioned shall be violated on the part of the said company or its directors, then, and in either such case, the entire principal of said bonds shall, for all purposes whatever, become due and payable, and payment thereof may be enforced accordingly in due course of law, with the interest thereon. And in no event shall any preference be given in the distribution of the proceeds arising under this deed, whether of the income to be produced by the prosecution of the business of said company before a sale shall be effected of said granted and sold premises, or from such sale; but all of such proceeds shall, after defraying
33 all proper costs and expenses, be divided pro rata to and amongst the holders of the bonds and the interest coupons, at maturity, at the time of making the dividend. And in the event of any default of payment or breach of any of the conditions aforesaid, the said Charles Moran and William Schall, the grantees of this deed, shall have power, and it is hereby made their duty upon the written request of the holders of not less than seven hundred thousand dollars of said bonds and overdue coupons, estimated at the par value thereof, to enter into and take possession of said granted and sold premises together with all additions that may, at the time of so doing, be made thereto or belong to said company, and by themselves or their agents and employees to operate and carry on the business of said railroad and all additions thereto; and in so doing to complete any engagements entered into by said company remaining to be completed, for transportation upon, and repairs and reconstruction of said railroad; and the proceeds thereof remaining, after paying and defraying all costs, charges and expenses to be incurred in so doing, to pay, distribute and apply, pro rata, as aforesaid, to the holders of the bonds aforesaid, and the coupons to the same belonging, which shall be due and unpaid. And it shall be the duty of said grantees of this deed, after taking possession as aforesaid, or in case of default as aforesaid and upon the written request of the holders of not less than seven hundred thousand dollars of bonds and coupons estimated as aforesaid with or without such possession being taken, to proceed by public sale at a time and place to be published at least thirty days before the day of sale in at least fifteen consecutive issues of at
34 least two daily newspapers of good circulation printed in each of the cities of New York, Philadelphia, Baltimore, and Cincinnati, to sell to the highest bidder for cash, to be paid according to the conditions of said sale, at such reasonable time or times, to admit of capitalists making the arrangements for the payment thereof, and upon such terms of security for such payment as shall be designated in such notice, the said granted and sold premises hereby conveyed, with all such additions, extensions and improvements, as, at the time of such sale, shall have been made thereto, or be in progress of being made by said company, including all of the rolling-stock and property of every kind and description which shall then belong to said company, and have been provided or intended to be used by said company in carrying on its railroads, together with the franchises of said company, including its franchises to be and act as a corporation, and upon such

sale being perfected, and payment of the purchase money, to deliver to the purchaser or purchasers a deed of conveyance, transferring and conveying to, and vesting in them all of the right and title to the premises so to be sold which before and at the time of such sale was vested in said company, but free and clear of any incumbrance thereon by virtue of this deed, or by any contract or conveyance, mortgage or lien of any kind or description, that shall at any time hereafter be made, executed or suffered by the grantor of these presents, or that now may exist upon the same, in virtue of the premises above recited by reason of the original bonds, which are to be deposited as aforesaid with the grantees hereof, and for which the bonds hereby secured are to be substituted, it being the express intention of the parties hereto to vest in the purchaser or purchasers of the premises to be sold as aforesaid an unencumbered title thereto; and all grants and conveyances, mortgages and liens, hereafter to be made or
35 suffered by said company of or upon said premises shall in terms and legal effect be subject to the operation and effect of this deed and to the execution of the power herein and hereby created and granted to effect a sale and conveyance of the premises as aforesaid or as herein further provided. But if for any cause the grantees hereof shall deem it more fitting or expedient to invoke the aid of a court of justice having competent jurisdiction to enable them to execute the powers and trusts hereby created in the management and sale of the premises so authorized to be sold and managed as aforesaid than to execute the same without such aid, it shall be competent for them to proceed accordingly, and in such case to execute their said powers and trust in conformity with what shall be ordered and decreed by such court; and in either mode of procedure said grantees shall be entitled to retain, out of the proceeds to arise and which shall remain after defraying all necessary and proper charges and expenses, including fees of legal counsel and attorneys retained and employed by them, a just and reasonable compensation for their services in the execution of said powers and trusts; and the residue of said proceeds shall be equitably divided, so that so much thereof as shall in equity result from that part of said premises to be sold as aforesaid which is conveyed by this deed to the grantees thereof, namely, the railroad of said company within and between the city of Zanesville, in the county of Muskingum, and the town of Morrow, in Warren County, and all and singular the other property and franchises which were conveyed by the master commissioner to Charles Moran, as herein above described, with all additions and improvements that may hereafter be made thereto, but not includ-
36 ing any extension beyond those points that may be made of said railroad, shall be ascertained in the most equitable way practicable, it being the intention of the parties to secure a sale of the entire road and all property and franchises connected and used or provided to be used therewith as an entirety, if in any event a sale under the powers hereby conferred shall become necessary, and the said equitable part of said proceeds, to be ascertained as aforesaid, shall be distributed and applied in payment, pro rata, of the principal of the said bonds, and unpaid interest coupons due thereon as aforesaid, intended to be secured by this deed, until the same shall be fully paid, and the residue of said equitable part of said proceeds, together with the residue of the proceeds of said sale arising from all other parts of the premises to be sold, shall be paid to said company, or to such claimants and creditors of said company as may legally and equitably be entitled

thereto; and if the equitable part of the proceeds to be applied thereto, as aforesaid, shall not be adequate to fully pay the principal and interest of the bonds intended to be secured by this deed, the holders of the unpaid residue thereof shall be entitled to participate in the distribution of the proceeds otherwise arising, as aforeseid, as may be lawful, due regard being had to priorities of lien, if any shall exist, in favor of other claimants against the same. Provided nevertheless, and it is hereby expressly reserved, that all funds that may be realized by said company upon the credit of the company in any form, or by the sale of preferred stock, for the purpose of completing the line of its road within the points of termini thereof, or to extend the same to other points or places, or to increase or improve the rolling-
37 stock thereof, shall be strictly limited in the expenditure thereof to said special uses, and no part of the property or proceeds thereof produced by the expenditure of such funds shall be applied in payment of the bonds and coupons secured by this deed until the debts incurred in the procurement of said funds shall be fully paid and discharged. And it is hereby declared that payment of the purchase money to the trustee or trustees making such sale by the purchaser or purchasers shall be valid, and that the purchaser or purchasers shall not be responsible in any way for the proper application thereof. Provided, however, and it is hereby further declared, that unless requested in writing by such amount in value of bondholders as above named to enter into and take possession of said premises or to proceed to make sale thereof by reason of any such default as aforesaid, the said trustees shall not be required to do so; and in executing their trust and powers aforesaid in good faith, without fraud, they shall not be held personally liable for any loss, accident, or injury that may happen or be sustained by any person or persons, but the same, so far as legally chargeable to or against them or any of them, shall be deemed a part of the expenses incident to the execution of said trust and powers, and be paid or refunded out of the trust property or the proceeds thereof, and they shall have the right to retain therefor accordingly.

Item fourth. In case of the death or disability of either the said Charles Moran or William Schall, the grantees of this deed, before the full execution of the trusts and powers herein created, shall be executed the complete and full execution thereof shall devolve upon the survivor, who is in such case vested with as full power and authority to
38 execute the same as if he had been constituted the sole grantee herein, and in the event of the death or disability of both of said grantees before said trusts and powers shall be fully executed, the power to fully execute the same shall devolve upon such person or persons as may be constituted or appointed by any court of competent jurisdiction in a proper case or proceeding to be instituted for that purpose, by or at the instance of any bondholder or person having an interest in the execution of said trusts and powers, and in such case the trustee or trustees so constituted shall execute the said trusts and powers in conformity with the orders and instruction of such court and subject to confirmation if so required by said court; and in case of the death or disability of the person or persons so to be appointed, the vacancy may be filled, and so again continuously from time to time as often as said trust may become vacant, in like manner, with like power to the appointee until said trusts and powers shall be fully accomplished.

Item fifth. If the said Cincinnati and Zanesville Railroad Company, or its successors or assigns, shall well and truly pay to the holders

of the bonds and coupons aforesaid as the same shall mature and become due, or at any time before sale shall be made in pursuance of the powers aforesaid, with interest after maturity, and shall pay and discharge all expenses that shall have been incurred by said trustees with a view to the execution of said trusts and powers with a just compensation to them for their services, all of which payments after default may be made to said trustees or their successor or successors for the use of the parties entitled thereto, to be distributed by said trustees or their successors without any responsibility touching the same
39 upon said company, at the proper expense of the distributees, including a just compensation to said trustees or their successors for their services and expenses, then and in such case this deed shall become void and inoperative, and if possession shall have been taken of the premises or any part thereof under it, the same shall be immediately restored upon such payment being made to said company, together with all property, money, credits, and effects, that may remain in the hands of said trustee or trustees, and which in equity shall belong to said company.

In witness whereof the said The Cincinnati and Zanesville Railroad Company, party grantor of this deed, by Erasmus Gest, the president of the board of directors of said company, by order of said board hereto annexes the corporate seal of said company and his signature and seal as such president, this first day of April A. D. 1864, and the said Charles Moran and William Schall, the grantees hereof, as evidence of their acceptance hereof, and of the trusts hereby created, also hereto annex their signatures and seals.

ERASMUS GEST, [SEAL.]
President of C. & Z. R. R. Co.
CHARLES MORAN. [SEAL.]
W. SCHALL. [SEAL.]

Signed, sealed, acknowledged, and delivered in presence of us:
H. C. HAM.
E. T. LOWE.

THE STATE OF OHIO,
Hamilton County, ss:

40 On this day personally came the Cincinnati and Zanesville Railroad Company, the grantor of the foregoing deed, by Erasmus Gest, president of the board of directors of said company, hereunto duly authorized by a special order of the board of directors of said company, before me, a notary public in and for said county, and acknowledged that he sealed said deed with the corporate seal of said company, and signed and sealed the same as president of the board of directors of said company, for the full purposes therein expressed and contained.

Given under my hand and notarial seal, at Cincinnati, in said county, this first day of April, A. D. 1864.

[L. S.] NICHOLAS BIRD,
Notary Public.

Whereupon afterwards, to wit, on the day and year aforesaid, there was issued out of the clerk's office of said court our certain writ of subpœna ad respondendum against the said defendant, clothed in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon the Cincinnati and Zanesville Railroad Company, citizens of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court
41 of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the first Monday of June next, to answer a certain bill in chancery filed and exhibited in said court against them by Charles Moran, citizen of and resident in the State of New York. Hereof you are not to fail, under the penalty of the law then ensuing; and have you then and there this writ.

Witness the honorable Salmon P. Chase, Chief Justice of the United States, this 30th of April, A. D. 1869, and in the 94th year of the Independence of the United States of America.

Attest:
[SEAL.] JOHN McLEAN, *Clerk.*

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the clerk's office of said court on or before the first Monday of June next, otherwise the said bill may be taken pro confesso.

JOHN McLEAN, *Clerk.*

And afterwards, to wit, on the fourth day of May, in the year aforesaid, an entry was made upon the journal of said court, in the words and figures following, to wit:

Interlocutory order.

CHARLES MORAN, TRUSTEE, vs. THE CINCINNATI AND ZANESVILLE RAILROAD Company. } In chancery.

On motion of the complainant, by Hunter and Dougherty, his at-
42 torneys, the defendants being thereof notified, and by Mr. Hoadly, its attorney, appearing to said motion, and the matter thereof being argued by counsel and considered by the court, it is ordered, subject to such further order as may from time to time be made by the court during the pendency of the cause, that the railroad of the defendant, its appurtenances, franchises, and privileges be conducted, managed, operated, and carried on in the most prudent and economical manner for the transportation of passengers and freight by the corporate officers of the company, with the assistance of such agents and employees as they shall deem necessary therefor, and they, in like manner, by necessary and proper works of repair, construction, and reconstruction, put, keep, and maintain said railroad, its rolling stock, fixtures, and property of every description necessary for the purposes aforesaid, in safe and proper condition for business, so far as the same may be practicable, by the use of the money and funds belonging to the defendant now on hand, or which may accrue from the business so to be carried on as aforesaid, or which may now be due

and owing to the defendant from any source whatever; and of their receipts and disbursements in the premises they are hereby ordered and required to keep exact, just, and faithful accounts in proper form, in books to be provided for that purpose, and the same to exhibit, report, and settle to and with this court, as may be ordered from time to time, according to the usage of courts of equity in receiverships in such cases.

And for all the purposes aforesaid, said corporate officers are authorized, subject to further order as aforesaid, to continue to use the corporate name, and to exercise the corporate power and franchises of
43 the defendant as may be lawful in contracting with third persons, and in prosecuting and defending suits at law or in equity, whether in relation to business to be transacted by them, under and in pursuance of this order, or such as may have arisen prior to the making of the same. And they, the said corporate officers now acting as such, and all others who may succeed them as such, pending this suit, upon and after service of a copy of this order upon the president of the board of directors of the defendant, who is hereby directed and required to make known the same to them, are hereby enjoined and required, in exercising their functions, to conform to the requirements of this order, and in default thereof will be held amenable as for a contempt thereof, unless within a reasonable time, and without unnecessary delay, it be made known to the court, by and through the president, that they, the said corporate officers, or such of them as may choose to do so, decline to accept of the trust; and the president, without unnecessary delay, is required to return the copy of this order so to be served on him with his report of what he shall do pursuant thereto, as to accepting said trust or declining the same.

Marshal's return.

And afterwards, to wit, on the tenth day of May, in the year aforesaid, came the said marshal, to whom the said writ of subpœna was in form aforesaid directed, and returned the same into the clerk's office of the court aforesaid, with his proceedings endorsed thereon, in the words and figures following, to wit:

44 And afterwards, to wit, on the twenty-third day of September, in the year aforesaid, an entry was made upon the journal of said court in the words and figures following, to wit:

Decree pro confesso.

CHARLES MORAN
vs.
THE CINCINNATI AND ZANESVILLE RAILROAD Company. } No. In chancery.

And now comes the complainant in the above-entitled cause, by Hunter and Daugherty, his attorneys, and upon his election and motion, it is ordered that the bill of complaint be taken pro confesso, the defendant not having filed any plea, answer or demurrer thereto, according to the rules of the court, but being in default, and this cause is continued.

And afterwards, to wit, on the sixth day of October, in the year aforesaid, another entry was made upon the journal of said court in the words and figures following, to wit:

Decree.

CHARLES MORAN, TRUSTEE,
vs.
THE CINCINNATI AND ZANESVILLE RAILroad Company. } In chancery.

In this cause came the complainant, by Hunter and Dougherty, his attorneys, and the defendant still failing to plead, answer, or demur to the complainant's bill of complaint, it is ordered that the default of the defendant at rules be confirmed, and that the cause be proceeded in ex partes, and that the matter of the bill of complaint be taken as
45 confessed; and thereupon the court doth find the equity of the cause to be with the complainant, and that the defendant, the Cincinnati and Zanesville Railroad Company, did, as charged in the bill of complaint, at the time therein mentioned, make, execute, and deliver to the complainant, Charles Moran, and William Schall, as grantees thereof, the mortgage or deed of trust in the bill of complaint mentioned, a copy of which is exhibited with the bill, of and upon the railroad, other property, rights, and franchises therein described and subject to the conditions therein set forth; and that the said grantee caused and procured the same to be recorded at the times and places in the bill of complaint averred and charged, and that the same is a legal and valid conveyance in fee of all and singular the said railroad, other property, rights, and franchises, subject to the conditions aforesaid. And the court doth further find that the said William Schall, one of said grantees, since the delivery and recording of said mortgage, or deed of trust, removed out of the United States, and became and is permanently domiciled in Europe, and is disabled to further unite in the execution of said trust with the complainant, and by reason thereof the court doth find that the execution of said trust is, in equity, devolved upon the complainant alone, and doth order that the same be executed by the complainant alone, as herein ordered and decreed. And the court doth further find that said defendant did make and negotiate its several bonds with coupons attached for the payment of interest on said bonds, as alleged and charged in the bill of complaint, the principal sum thereof being the sum of one million three hundred thousand dollars, bearing interest, as per said coupons, at the rate of seven per cent. per annum, payable semi-annually, on the first day of May and November of each
46 year, from and after the first day of November, A. D. 1863, the consideration thereof, in legal effect, being the loan of money by the defendant, the said principal sum maturing on the first day of November, A. D. 1893, and both the principal and interest being payable at the American Exchange Bank, in the city of New York. The court doth further find that the whole amount of said bonds, and the unpaid interest coupons, as hereinafter specified, are outstanding in the hands of third persons, claiming to be bona fide holders thereof, and that though the defendant hath paid all of said coupons which matured prior to the 1st day of May, A. D. 1867, yet it has wholly failed to pay any part thereof that matured on that day or subsequently thereto, or any part of the interest that has accrued upon said unpaid coupons subsequent to the dates of the maturity thereof. Whereupon the court doth find, order, adjudge, and decree, that there is due and owing by and from the defendant to the legal holders of the interest coupons of said bonds which matured on the first day of May, 1867; the first day of November, 1867; the first day of May, 1868; the first day of November, 1868; and the

first day of May, 1869, and on account thereof, in the aggregate, on each of said days, the sum of forty-five thousand five hundred dollars, with interest thereon from said dates, severally, at the rate of seven per centum per annum, till the same shall be paid; and by reason of the premises the court doth further find that the condition of said mortgage or deed of trust hath become, and is, broken, and that the same hath become and is absolute at law, but subject in equity to be redeemed by the payment of the principal sum of one million three hundred thousand dollars of said bonds, which, by reason of the default aforesaid of
47 the defendant to pay the interest thereon, upon and according to the terms and provisions of the third item of the conditions of said mortgage, has also become due and payable, and by the further payment of the said interest coupons now at maturity as aforesaid and interest thereon accrued and accruing within the time now here limited for that purpose, that is to say, within twenty days from and after the date of entering this decree; which payment shall be made by the defendant at the American Exchange Bank, in the city of New York, to the complainant in trust for the use of the legal owners and holders of said bonds and coupons, and which he shall pay over and distribute to them, severally, according to their respective rights. And in the event of such payment being made within the time aforesaid, together with an equitable proportion of the coupons which are to mature on the first day of November, 1869, on said bonds, it is ordered and decreed by the court that said mortgaged premises shall thereby stand and be redeemed from the operation and effect of said mortgage, and the same shall be and remain void in law and equity; but if the defendant shall fail to make payment as aforesaid within the time aforesaid, then and in that case it is adjudged and decreed by the court that the defendant be forever barred and foreclosed of and from all right in equity to redeem said mortgaged premises, and, further, that all and singular the said mortgaged premises, the railroad, other property and franchises, which had previously been conveyed as recited in said mortgage or deed of trust by the master commissioner to the said Charles Moran, and by him to the defendant, the grantor thereof, late the property and franchises of the Cincinnati, Wilmington and Zanesville Railroad Company, and described more particularly, namely, as the entire
48 property and road late the property of the said Cincinnati, Will mington and Zanesville Railroad Company, lying within and between the town of Morrow and the city of Zanesville, in the State of Ohio, including the right of way formerly held and owned by said company, whereon that part of its road as aforesaid is constructed and in use, and the lands occupied thereby, by whatever right the same may have been holden by said company, together with the superstructure and tracks thereon, and all bridges, viaducts, culverts, fences, depot grounds and buildings thereon, and all other franchises, rights, and privileges of said railroad company, including the rights and franchises of said company to be and act as a corporation, and also including, as a part of said premises, all engines, locomotives, cars of every description, rolling-stock, turn-tables, water-stations, warehouses, and lots and lands used in operating said road or in connection therewith, and owned and held for that purpose; and all tools, implements, and materials and supplies, and all shops and engine-houses owned and in use in operating said road, as all the same were held, owned, used, and employed by said company, with all accessions thereto, as the same existed and were owned and held by the defendant in this suit at the date of the mortgage or deed of trust so made as aforesaid by it to the said Charles Moran

and William Schall, grantees thereof as aforesaid, and all additions' improvements, and accessions thereto, made or acquired by the defendant subsequent thereto, be sold, as herein directed, ordered, and prescribed, by the fee simple title thereof, to the highest bidder, payable in money at any upon the confirmation of such sale by the court, which payment shall be made to the complainant, Charles Moran, in his
49 said capacity of trustee, to be held, paid over, and applied to the several parties and persons equitably entitled thereto, as the court shall further order, adjudge, and decree. And upon confirmation of the sale to be made as aforesaid, and upon payment to him of the purchase-money aforesaid, the said Charles Moran, in his said capacity of trustee and as a special master commissioner of this court in this cause, shall, and he is hereby authorized, empowered, directed, and required, by deed, in fee simple, to convey to the purchaser or purchasers, his or their legal representatives, successors, or assigns, all and singular the said railroad, other property, and franchises, with all and singular the privileges, appurtenances, additions thereto, accessions, and improvements, made or acquired since the execution of said mortgage, previous to the date of the rendition of this decree, including necessary repairs required to be made after the rendition of this decree, pursuant to the interlocutory order of the court heretofore made in this case to secure safety in operating the road, but not including any new acquisitions, additions, or accessions to be made after the entering of this decree, if any such shall be made, it being the intention of the court to prohibit by this order the making of such new acquisitions, additions, or accessions, after entering their decree, at the expense of the trust fund, or, if made, that the same be charged over against the purchaser, to be paid in addition to the purchase-money to be bid at the sale, such new additions, acquisitions, or accessions not being in the contemplation of the court in fixing the minimum value subject to which said sale is to be made as herein provided. And the court, being furnished by the complainant, in his capacity of trustee, with a report made by Erasmus Gest, esq., president of the board of directors
50 of the defendant, whose knowledge of the subjects-matter to be sold as aforesaid the court has reason to believe is such as to enable him to place a just valuation upon the same, and the truth and integrity of said report being verified by the affidavit of said Gest thereto annexed, which report and verification are by the court ordered to be filed; and the court confiding therein as the most reliable source of information within its power to be obtained for the purpose of enabling it to fix a minimum value, below which said sale shall not be made, to prevent sacrifice, it is, for this equitable purpose, now ordered, subject to the power of the court to modify the same as in its discretion shall appear to be just, upon the motion of any person interested at any time before a sale of said premises shall be made, that no such sale shall be made pursuant to this decree for a sum or price less than the sum of one million three thousand nine hundred and sixty-eight dollars ($1,003,968.00). It is further ordered, adjudged, and decreed by the court that the said railroad, other property, and franchises of the defendant shall be sold, if default be made as aforesaid, by public sale at the court-house door of this court, in the city of Cincinnati, to the highest responsible bidder, by the said Charles Moran, in his said capacity of trustee and as special master commissioner of this court, he being hereby constituted and appointed such, to carry into execution this and all other orders to be made herein; but before offering said premises for sale as aforesaid he shall advertise the time and

place of sale, during a period of at least thirty days preceding the day of sale, by publication in at least fifteen consecutive issues of at least two daily newspapers of good circulation printed in each of
51 the cities of New York, Philadelphia, Baltimore, and Cincinnati, specifying in general terms in said advertisement the subject-matter to be sold, as "the railroad, other property, and franchises, including the franchises to be and act as a corporation, of the Cincinnati and Zanesville Railroad Company in the State of Ohio;" also specifying the minimum valuation subject to which said sale is limited to be made and the terms of payment of the purchase-money as required by this order, with such other matters in brief as may serve to direct the persons wishing to purchase to the sources of information for particulars. It is further ordered that if default be made as aforesaid, our writ of sale be issued by the clerk upon the precipe of the attorneys of the complainant, to be addressed to said Charles Moran as trustee and special master commissioner as aforesaid, returnable to this court at any time after a sale pursuant thereto shall be effected; and if for any reason a sale shall not be effected at the first offering, it shall be competent for said trustee and master commissioner to adjourn the biddings from day to day or time to time by proclamation at the time and place of such offering, and pursuant thereto to continue the biddings and complete the sale; or he may, in his discretion, advertise the sale de novo and proceed accordingly upon the same writ, taking care to return the same before or within our next term, and as soon after a sale shall be effected pursuant thereto as may be practicable, and therewith to report in writing over his signature his doings in the premises; and, further, it is ordered that the highest bidder shall, as a security for the performance on the part of such bidder, make a deposit in money of the sum of fifty thousand dollars in the hand of said master commissioner,
52 to be absolutely forfeited to the uses of the trust as the court may order, in case said bidder shall fail to complete his purchase upon confirmation of said sale; and upon such failure said sale shall, except as to said forfeiture, be set aside, and a new writ of sale be issued, toties quoties, till a sale shall be perfected. But if the bidder shall fulfil his contract of purchase, his said deposit shall be applied as so much paid upon his bid, and thereupon the said defendant by its officers and agents, and the said Charles Moran as trustee and master commissioner as aforesaid, shall, without any delay, deliver up the possession of the said railroad, other property, and franchises, to the said purchaser or purchasers, his or their assigns, agents, and employees; and thereupon the said corporate officers of the defendant shall make full report to the court of their trust as receivers under the interlocutory order of the court heretofore entered herein. And the said Erasmus Gest, as the president of said defendant company, with the assistance of the agents and accounting officers of said company, is hereby ordered and required to report to this court, without unnecessary delay, a detailed account of their receipts and disbursements of all money received by them since their acceptance of the said trust as receivers under the said interlocutory order, specifying what part of their said receipts have been derived from the resources of the defendant existing previously to their said acceptance, and what since, and showing what parts of the disbursements were for liabilities or considerations which existed prior to their said acceptance, and what since; also, that they report in detail
53 what liabilities the legal validity of which is not controverted, so far as known to them, shall remain unpaid at the time of said report and which were outstanding at the time they accepted said receiver-

ship, and such as have been created since and remain unpaid, and showing the amount of money remaining in their hands, and from what sources realized. And all further questions proper to be considered and adjudicated by the court, in the further progress of the case, and not adjudicated in this decree, are hereby reserved for the consideration of the court.

It is nevertheless ordered and provided that, in the event that the sale to be made as aforesaid shall be made to the holder or holders of any of the bonds and coupons secured by said deed of trust, or to any person or persons in trust for the use of such holders, such purchaser or purchasers shall not be required to pay in hand, on the confirmation of the sale, any greater amount of the purchase-money than shall be in excess of his or their distributive share thereof, to be fixed and ascertained provisionally by arrangement, as nearly as may be, between the purchaser or purchasers and the special master commissioner, subject to be more accurately ascertained by the further order of the court. It is further ordered that the clerk issue a copy of this decree to the said trustee and special master commissioner duly certified under the seal of the court, upon the written præcipe of the solicitors of the complainant as and for the writ of sale above provided for, with our mandate that he carry the same into execution and report his doings in the premises to the court accordingly.

54 And thereupon, afterwards, to wit, on the same day, in the year aforesaid, there was issued out of the clerk's office of said court, upon the præcipe of Hunter and Dougherty, complainant's solicitors, a duly certified copy of said decree and order of sale, directed to the said Charles Moran, trustee and special master commissioner, as aforesaid, with the mandate of our said circuit court thereto appended, clothed in the words and figures following, to wit:

Order of sale.

You are therefore hereby commanded in the execution of your trust and duty as trustee and special master commissioner of this court, in all things strictly to conform to the directions and provisions hereinabove recited, and to advertise the said railroad, other property, and franchises of the defendant in the form in said decree prescribed, and to sell the same to the highest bidder on the terms and conditions hereinbefore set forth; and that you make return of this writ with your doings thereon at any time before or within our next February term, and as soon after a sale effected pursuant to said decree as may be practicable.

Witness the honorable S. P. Chase, Chief Justice of the United States, this 16th day of October, A. D. 1869, and in the 94th year of American Independence.

Attest:

[SEAL.] JOHN McLEAN, *Clerk.*

To CHARLES MORAN,
Trustee and Special Master Commissioner.

55 And afterwards, to wit, on the second day of December, in the year aforesaid, came the said trustee and special master commissioner, and filed in the clerk's office of the court aforesaid his report of sale, clothed in the words and figures following, to wit:

Report of sale.

Report.

I, the undersigned, Charles Moran, trustee and special master commissioner, report and make known to the court that, having received the official order and decree hereto annexed, and mandate to execute the same, and having been duly sworn to perform the duties prescribed thereby, as shown by the certificate of Kennoth G. White, United States commissioner, hereto attached, and the defendant, the Cincinnati and Zanesville Railroad Company having failed to pay to me within twenty days from the date of the rendition of said decree the amount found due by the court, as set forth in said decree, I caused said mortgaged premises to be advertised for sale as directed and required by said decree, copies of which advertisements, with proof the publication thereof, I herewith return, and pursuant thereto, the defendant still failing to make payment as aforesaid, I proceeded at the court-house door of this court, in the city of Cincinnati, between the hours of ten o'clock a. m. and 4 o'clock p. m. of the 1st day of December, A. D. 1869, being the time and place of sale so advertised, by public vendue and outcry, to offer and expose to sale the said mortgaged premises as described in the decree, with the accessions, additions, and improvements thereto belonging, to the highest bidder, upon the terms prescribed by the
56 decree, and thereupon Thomas L. Jewitt bid therefor the sum of one million and four thousand dollars, and his said bid being the highest and best bid therefor, and more than the minimum price fixed by the decree, I struck off and sold the same to him at his said bid, payable according to the terms and requirements of the decree.

I further report and make known to the court that the said purchaser, Thomas L. Jewitt, is the owner and holder of bonds secured by said mortgage to the sum and amount of eight hundred and seven thousand dollars of the principal of said bonds, also of the coupons thereon for interest, which became due on and since the first day of May, A. D. 1867; and that it is equitable, upon his surrendering into my hands, subject to be held and disposed of as shall be further ordered by the court, the said bonds and coupons, that he, the said purchaser, be permitted to retain subject to like order of the court, on account of the probable dividend to accrue to him on said bonds and coupons, the sum of five hundred and sixty-two thousand dollars ($562,000); and that said Jewitt has paid to me, to be administered and disbursed and applied as the court shall hereafter order and direct, the residue of the purchase-money bid by him as aforesaid, being the sum of four hundred and forty-two thousand dollars ($442,000.00).

I further report and make known to the court that, upon enquiry into the probable condition of the assets of the said defendant, the Cincinnati and Zanesville Railroad Company, in the hands of the receiver, other than the proceeds of the sale of the said mortgaged premi-
57 ses, and the liabilities of said company to which the same may be applicable, including the probable amount of the costs, charges, and expenses of all kinds accrued and to accrue in this case, an appropriation of the sum of one hundred thousand dollars, to be retained out of the proceeds of said sale, provisionally subject to the further order of the court, will be amply sufficient, in addition to the other assets in the hands of the receivers, to liquidate the said liabilities and costs, charges and expenses, which may be legally payable and entitled to preference in distribution to the claims of the bondholders, thereby

leaving in my hands the sum of three hundred and forty-two thousand dollars ($342,000), provisionally applicable in distribution to the payment of dividends to the holders of bonds and coupons secured by said mortgage other than the said purchaser, Thomas L. Jewitt.

All which is respectfully submitted.

CHS. MORAN,
Trustee and Special Master Commissioner.

With which said report of sale was filed the official oath of the said special master commissioner, clothed in the words and figures following, to wit:

Special master's oath.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Before me, Kennoth G. White, a commissioner of the United States within and for the district aforesaid, personally appeared Charles
58 Moran, the person named as special master commissioner of the circuit court of the United States for the southern district of Ohio, in the case of Charles Moran, trustee, against the Cincinnati and Zanesville Railroad Company, as in the within decretal order in said case the same appears, and made oath in due form of law that he will, in all things, according to the best of his ability and judgment, execute and perform all and singular the duties required of him in and by said decretal order, and all such further orders as shall be made in said case.

CHS. MORAN.

Sworn to by the said Charles Moran before me, and by him subscribed in my presence.

Witness my hand and official seal this first day of November, A. D. 1869.

KENNOTH G. WHITE,
U. S. Commissioner South. Dist. New York.

And with which said report was also filed the following proof of publication and the sale notice:

Sale Notice.

STATE OF OHIO,
Hamilton County, ss:

Personally appeared before me, a notary public in and for Hamilton County, Alex. Murray, for publishers of the Cincinnati Daily Gazette, being duly sworn, says that the annexed advertisement was published in the Cincinnati Daily Gazette, a newspaper printed and of general circulation in said county, for fifteen consecutive secular days, com-
59 mencing upon the twenty-seventh day of October, 1869, also on November 16th, 23d, and 30th. Affiant further says that a daily and weekly edition of said newspaper is published and that the circulation of the daily in this county exceeds that of the weekly, and that the cost of publication in the daily does not exceed that of the weekly.

ALEX. MURRAY.

Charges $90.40 adv't affidavit.

Sworn to and subscribed before me this first day of December, 1869.

A. T. BUTLER,
Notary Public in and for Hamilton County.

Railroad foreclosure sale.

The undersigned, grantee in trust, and as special master commissioner of the circuit court of the United States in and for the southern district of Ohio, in the case of Charles Moran, trustee, against the Cincinnati and Zanesville Railroad Company, pending in said court, in chancery, by authority of the decree rendered in said cause at the October term thereof, A. D. 1869, will on the first day of December, A. D. 1869, between the hours of ten o'clock a. m. and 4 o'clock p. m. of said day, at the door of the court-house of said court, in the city of Cincinnati, Ohio, offer and expose to sale by public vendue to the highest bidder for cash, payable on confirmation of said sale by said court, but not for less than the minimum sum fixed by said court, namely, one million three thousand nine hundred and sixty-eight dollars ($1,003,968.00), the railroad, other property and franchises, including the franchise to be and act as a corporation of the Cincinnati and Zanesville Railroad Company,
60 in the State of Ohio. If no sale shall be effected at the time and place above designated, the biddings will be adjourned from day to day, or time to time, by proclamation, and pursuant thereto will be continued to complete the sale; possession of the premises to be delivered to the purchaser on confirmation and payment of the purchase-money, compliance in other respects with the terms of the order of sale by the purchasers being also required.

CHARLES MORAN,
Trustee and Special Master Commissioner.
Address, New York City.

HUNTER & DAUGHERTY,
Solicitors for Complainant.
Address, Lancaster, Ohio.

A like advertisement of sale and proof of publication in the Cincinnati Daily Gazette and the Cincinnati Daily Commercial were also filed with said report.

And afterwards, but on the day and year last aforesaid, an entry was made on the journal of said court, concerning said cause, in the words and figures following, to wit:

Decree confirming sale.

CHARLES MORAN, TRUSTEE,
vs.
THE CINCINNATI AND ZANESVILLE RAILROAD Company. } In chancery.

In this case came Charles Moran, trustee and special master commissioner, and returned into court our order of sale to him directed, whereby it appears and is made known to the court that, in obe-
61 dience to the command of said order—he being first duly sworn to faithfully perform and discharge the duties required of him in that behalf—he caused the premises so ordered to be sold to be advertised for sale as directed and required by said order, and that in pursuance thereto he did on the first day of December, A. D. 1869, between the hours of ten o'clock a. m. and 4 o'clock p. m. of said day, at the door of the court-house of this court, being the time and place of sale so advertised, by public vendue offer and expose to sale the said mortgaged

premises, with the accessions and appurtenances thereunto belonging; and that Thomas L. Jewitt then and there bid therefor the sum of one million and four thousand dollars, and his said bid being the highest and best bid therefor, and more than the minimum sum specified in said order, he had struck off and sold the same to him at his said bid; and the court having inspected the report and the proceedings of the said trustee and special master commissioner, do find the same in all particulars had, made, and done in conformity with the order and decree aforesaid.

Whereupon, it is now further ordered and decreed by the court that the said sale so made as aforesaid be, and the same is hereby, in all things confirmed and established.

And the said trustee and special master commissioner, having further by his said report made known to the court that the said Thomas L. Jewitt is the owner and holder of bonds, secured by the mortgage in the petition named, to the sum and amount of eight hundred and seven thousand dollars of the principal sum so secured, and the coupons and interest thereon accrued since May 1st, A. D. 1867, that he has deemed
62 it equitable, subject to the further order of the court, to allow the said Thomas L. Jewitt to retain in his hands on account of his dividend on said bonds and coupons the sum of five hundred and sixty-two thousand dollars, and has received from him the residue of said purchase money, to wit, four hundred and forty-two thousand dollars.

And the said trustee and special master commissioner, having reported and made known to the court that upon inquiry into the probable condition of the assets of the said defendant, the C. & Z. R. R. Co., in the hands of the receivers, other than the proceeds of the sale of the said mortgaged premises and the liabilities of said company to which the same may be applicable, including the probable amount of the costs, charges, and expenses of all kinds accrued and to accrue in this case, an appropriation of the sum of one hundred thousand dollars, to be retained out of the proceeds of said sale, provisionally, subject to the further order of the court, will be amply sufficient in addition to the other assets in the hands of the receivers to liquidate the said liabilities, costs, charges, and expenses, which may be legally payable and entitled to preference in distribution to the claims of the bondholders, thereby leaving in the hands of said trustee and special master commissioner the sum of three hundred and forty-two thousand dollars ($342,000), provisionally applicable in distribution to the payment of dividends to the holders of bonds and coupons secured by said mortgage, other than the said purchaser, Thomas L. Jewitt:

It is thereupon by the court further ordered that the said trustee and special master commissioner retain in his hands, subject to the further order of the court, the sum of one hundred thousand dollars, part
63 of the proceeds of the sale of the said mortgaged premises, and that he pay and distribute to the holders of the mortgaged bonds and coupons other than those held by the said purchaser, Thomas L. Jewitt, the said sum of three hundred and forty-two thousand dollars, the residue of the said proceeds of said sale, to each severally a pro rata proportion of said sum in proportion to the amounts of their respective bonds and coupons; subject, nevertheless, to such further equitable order of redistribution and recall as shall be made by the court in the premises, as well in regard to said other holders as in regard to the said purchaser, Thomas L. Jewitt.

And further, it is ordered by the court that the said Charles Moran,

as trustee and special master commissioner as aforesaid, upon request of the said purchaser, Thomas L. Jewitt, execute and deliver to the said Thomas L. Jewitt, his heirs and assigns, or to such other person or persons, or body corporate, as he shall in writing direct and request the same to be made to, as grantee or grantees, a deed of conveyance in full execution of the sale so made to him as aforesaid of the mortgaged premises, accessions, and appurtenances aforesaid; which conveyance so to be made shall be at the proper charge and expense of the trust in the hands of the said Charles Moran.

And the court doth further order and direct Erasmus Gest, president of the Cincinnati and Zanesville Railroad Company, and the other officers of said company, the receiver in this case, immediately upon notice of this order, to deliver over to the said Thomas L. Jewitt, his agents, servants, and employees, the full possession of the premises so sold and ordered to be conveyed thereby, closing their duties as such re-
64 ceivers in the business of operating and carrying on said railroad in pursuance of the former order of the court herein in that behalf. And that the said Erasmus Gest, as president as aforesaid, without unnecessary delay, and as speedily as may be practicable, close the duties assigned to said receivers and report the same to this court.

And for all other purposes, except so far as the same are by the former orders herein committed to the hands of the said Charles Moran, as special master commissioner, and especially for the purpose of auditing and receiving evidence in behalf of third persons who may assert claims or liabilities against the said Cincinnati and Zanesville Railroad Company, other than upon the mortgage bonds and coupons aforesaid, the said Erasmus Gest, in his individual capacity, and not as president, be and he is hereby constituted and appointed a special master commissioner in this case and as such is hereby directed to give notice at least in one newspaper of good circulation, published in the city of Cincinnati, and in each of the counties through which the line of said road passes, of his said appointment, and that he will receive the presentation of claims in behalf of all persons against said company with the proofs thereof, at a place to be designated by him at any time before the fifteenth day of January, A. D. 1870. And he is required to report touching said claims and liabilities, allowing or disallowing the same to this court, on or before the first day of our next term, and the parties interested are required to file exceptions to said report, or any part thereof, within one month after the same shall be filed.

And for all other purposes this cause is continued to the next
65 term of this court.

And afterwards, to wit, in the year of our Lord one thousand eight hundred and seventy, on the eighteenth day of February, an entry was made on the journal of said court in the words and figures following, to wit:

Decree distribution.

CHARLES MORAN, TRUSTEE,
vs.
THE CINCINNATI & ZANESVILLE RAILROAD COMPANY. } In chancery.

The complainant having filed his petition herein, praying the court, among other things, to audit and settle his account for expenses incurred

and disbursed by him as trustee and master commissioner to the 28th day of January, 1870, as set forth in his memorandum thereof filed with his said petition; also to order and direct what amount of money in addition thereto he shall retain out of the residue of the proceeds of sale of the mortgaged premises, remaining in his hands, to compensate him for his services rendered and to be rendered as grantee in trust of said mortgage and as master commissioner to effect the sale of said premises, including the disbursing and distributing the proceeds thereof; also to order and direct what amount, part of said proceeds, he may or shall retain and apply in payment to his attorneys and legal counsel for their services rendered and to be rendered in this case; and the court having considered the said matter of said petition, doth find the amount of
66 the said disbursements, as set forth in the said memorandum thereof, to be the sum of $1,227.74, and that the same has been reasonably and necessarily disbursed by the complainant, as indicated by the items thereof; and the court doth further find that the complainant, for his services as trustee and master commissioner, in the execution of the order of sale herein to him directed, is reasonably entitled to retain as a commission the sum of $10,050.00, being the equivalent allowed by statute for like services when rendered by the marshal; and for his services as grantee in trust in and by said deed of trust or mortgage, otherwise than in executing the order of sale as aforesaid, and in addition thereto, the sum of $1,000.00; and that Hunter and Daugherty, as the attorneys and legal counsel of the complainant, for their services herein, including the drafting of the deed of conveyance to be made to the purchaser or his assigns of the mortgaged premises, are reasonably entitled to receive a commission of two and one-half per cent. on the amount of the proceeds of said sale, less the sum of $500.00 paid to them by the complainant as a retaining fee. Whereupon it is ordered that the complainant do retain and pay out of the funds in his hands as aforesaid the several sums so audited and allowed as aforesaid, together with the further sum of $1,004.00, the estimated value of the revenue stamps required to be attached to the deed to be made to the purchaser of the mortgaged premises; which payments so to be made and retained, shall be in full and for all commissions and all services rendered and to be rendered by the complainant and his said attorneys and legal counsel in this cause unless for special reasons requiring services to be ren-
67 dered not now anticipated in closing the case, the court deem it equitable to make a further allowance therefor.

And the cause came on to be further heard upon the report of Erasmus Gest, special master commissioner herein, to audit claims to be presented to him against said C. & T. R. R. Company, and upon the report of A. R. Duton, esq., as master commissioner, to whom was referred the accounts of the receivers herein; and upon all such other matters as upon the said petition of the complainant appear to be needful to be considered by the court, with a view to the declaring of a dividend to be paid peremptorily to the holders of the mortgage bonds and interest coupons heretofore found to be due and unpaid and outstanding. Whereupon the court doth find that so far as can be ascertained at present, the aggregate amount of money belonging to said company in the hands of the receivers, being other than the proceeds of the mortgaged premises as of the date of this order, is the sum of $06,273 37.

That, as nearly as can now be ascertained, the claims and liabilities against the company other than the mortgage bonds and coupons which are entitled to priority of payment out of said funds in the hands of the receivers, and which shall be paid by E. Gest, receiver, out of said fund

as called for, amount in the aggregate to the sum of $3,541.02, as nearly as the same can now be estimated, being the following named?

1. Balances due to other railroad companies specified in Exhibit G of the receiver's report and the supplement thereto.

68 2. Balances due to sundry persons, as specified in Exhibit L of said report.

3. Items No. 2, 3, 4, 5, & 6, specified in schedule A of the report of E. Gest, as master commissioner.

4. The judgment in favor of Samuel Campbell who, on leave, was made a defendant to the original bill, and which is specified in his answer thereto; and

5. The residue of the fund aforesaid in the hands of the receivers, so far as necessary for that purpose, is hereby specially appropriated to be applied and paid, to indemnify all persons who are bound as sureties for the company, in appeal or writ of error bonds, or for costs, or otherwise, in pending actions in which said company is a party, and for the payment of fees of attorneys and other necessary expenses incurred or to be incurred in litigating said cases, which residue shall be paid and applied as shall be directed by the future order of the court.

In respect to balances due from the company to vendors of real estate for purchases of the same, and which has passed to the purchaser of the mortgaged premises, as accessions thereto, the court is of the opinion that so far as the same cannot be paid out of the funds in the hands of the receivers not hereinabove otherwise provided for, the purchaser takes and holds the said real estate so purchased, subject to the vendor's lien for the unpaid residue of the purchase-money, and that the proceeds of the sale of the mortgaged premises are not in equity amenable to be charged with the payment thereof.

And in like manner the court is of the opinion and doth order
69 and adjudge that said proceeds in the hands of the complainant are not in equity amenable to be charged with the payment of any of the claims against the company other than such as are above named or referred unto, and for the payment of which provision is made as above out of the funds in the hands of the receivers; but the court, in view of the present legal impossibility to make a final dividend of said proceeds, doth order that, in addition to the appropriations herein made to be paid out of the same, there be reserved in the hands of the complainant as trustee, subject to the further order of the court, as shall be equitable, the sum of $11,043.12.

And the court doth find that after making provision as aforesaid, there remains in the hands of the complainant, as trustee of the proceeds of the sale of the mortgaged premises, the sum of $954,050.00, subject to distribution to and amongst the holders of the mortgage bonds and coupons; and the court doth order and direct that he pay and distribute the same to them, pro rata, so that an equal pro rata part thereof shall be paid to them severally, in proportion to the amounts thereof by them severally held; such payments to be made by him at his office in the city of New York on presentation and surrender to him of said bonds and coupons; and upon such surrender and payment, he shall deliver to the holders, severally, a certificate thereof, specifying the numbers and amounts of the bonds and coupons surrendered, and of the dividend paid thereon; which certificate for all purposes, in re-
70 spect to any further dividend to be ordered herein, and for all other purposes, shall be as available to the holder thereof as would be the original bonds and coupons; which originals shall be held by the complainant subject to the further order of the court.

And the complainant is directed to give notice in at least one newspaper of good circulation, published in New York, and one in Cincinnati, without unnecessary delay, of this dividend and the place of its payment.

The court doth further find, upon the report of Master Commissioner A. R. Dutton, that the said E. Gest, in his account as receiver, retained for his own services as receiver, in addition to his salary as president of the company, the sum of $1,500.00, including also for his services as master commissioner, and the same is allowed by the court to be in full for his services as receiver and master commissioner to the 1st day of February instant.

And the court doth further find upon the additional report of said E. Gest, as receiver, to the 16th day of February instant, that the expenses of the receivership to the 28th instant, as per items exhibited in said report, will be the sum of $655.00, being an estimated sum, and that the same, according to the actual amount as the same shall result, is equitably a charge upon the proceeds of the mortgaged premises in the hands of the complainant; and it is ordered that the plaintiff, on being advised by said Gest of the accurate amount to be paid, pay the same to said Gest, to be paid and applied by him to the proper use above named.

And the court doth allow to A. R. Dutton, esq., for his services
71 as master commissioner herein, to be paid out of the said fund last above named by the complainant the sum of $200.00.

It is further ordered by the court that the complainant retain out of the proceeds of the sale of said mortgaged premises, to and for his own use in the payment of the allowances herein above made to him, the sum of $12,277.74.

That he pay to Hunter and Daugherty, his counsel and attorneys for the commission herein above allowed to them, the sum of $24,600.00.

That he pay to John McLean, esq., clerk of this court, for the costs taxed herein, including the complete record to and including this order, the sum of $170.14.

That he retain to purchase revenue-stamps for the deed to be made to the purchaser of the mortgaged premises the sum of $1,004.00.

And it is further ordered and adjudged by the court that the proceeds of said mortgaged premises in the hands of the complainant not ordered to be applied as above, or to be distributed to the holders of the said bonds and coupons, are not, in law or equity, subject to be paid or applied in payment upon the claims of any of the following named claimants mentioned and referred to in the receiver's report, or the report of E. Gest as master commissioner, namely: Francis Jeffries, adm'r of the estate of Wm. L. Zentmyer, dec'd, Harness Renick, Moses Kouns, Geo. W. Pratt, Samuel Dumm, S. H. Guthrie, James Dodds, I. A. Smith,
72 W. D. Wilson, George B. Weaver, Mathias Combs, Alexander Wood, and Washington Brown. It being the opinion of the court that whatever may be the validity and merits of said claims as claims against said company, of which the court does not presume to judge, the said claimants on account thereof have not, nor as either of them any right in law or equity to participate in the distribution of said fund. And all questions touching the right of any other claimant or claimants, named or referred to in said master commissioner's reports, to participate in the distribution on account of their claims in said fund, are reserved for the further consideration of the court.

And the court doth further find upon the representations of the petition of the complainant that it will not be necessary after the close of the present month of February, 1870, to continue the receivership of the said E. Gest upon the footing of a monthly or other periodical com-

pensation for his services, or to retain under writ the office now in use for the business of the receivership, or to retain the services of a clerk in relation thereto. It is therefore ordered by the court that the leasing of said office, or any other office as a place of business at which to close up the business of the receivership, also the employment of the services of the clerk in relation to said business, cease and be discontinued, at the close of this month, and that the office-furniture in and about said office of every kind, including the iron safe that belonged to the said C. & Z. R. R. Company at the time of the sale of said mortgaged
73 premises to be delivered to the purchaser by said Gest at the close of this month, or as much earlier as practicable. That he in like manner surrender and deliver over to said purchaser all books, papers, archives and muniments of title, evidences of rights of way for the railroad, and other property equitably belonging to said purchaser as such, and all books containing the records of the organization of said company and of its predecessor, the Cincinnati, Wilmington and Zanesville Railroad Company.

And the said Erasmus Gest, subject to the order of the court and until otherwise ordered, is continued receiver in this case with power, subject to the approval of the court on his report of the same, to make settlements of all unsettled business growing out of or appertaining to said receivership, with directions to report his doings within the first ten days of our next April term; and for his services there shall be paid to him such compensation as shall be allowed by the court, and he shall retain, subject to the order of the court, all books, papers and vouchers as relate to the business of the receivership and to the unsettled business of the company.

It is further ordered that the period of twenty days be given to all parties interested in the distribution of the proceeds of the sale of the mortgaged premises to except to the allowances made as above to the complainant and his counsel for their services, and in the event of a reduction thereof being made upon the hearing of said exceptions the amount of such reduction shall be added to the reserved fund,
74 part of said proceeds to be afterwards distributed with any residue of said reserved fund to the bondholders, and for all other purposes the case is continued to the next term. And afterwards this cause was continued from term to term until the nineteenth day of June, eighteen hundred and seventy-four, at which time came the said Charles Moran, trustee and special master commissioner, and filed in the clerk's office of said court his final report in this case, clothed in the words and figures following, to wit:

Final report of Moran.

CHARLES MORAN, TRUSTEE,
vs.
THE CINCINNATI AND ZANESVILLE RAILROAD COMPANY. } In chancery.

The undersigned, trustee and special master commissioner, begs leave to report:

That in pursuance of the order of the court he has duly paid and distributed to the holders and owners of the first-mortgage bonds of the Cincinnati & Zanesville R. R. Co. a dividend of $73\frac{35546}{100000}$ per cent. on $1,296,500 of said bonds, say in all	$951,481 40
Less deducted for missing coupon	35 00
Total payments	$951,446 40

That there still remains to be paid to the parties in interest, who have not presented their claims, dividend of
75 $73\frac{38846}{100000}$ per cent. on $3,500, 1st-mortgage bonds, say $2,568 60
Am't retained for missing coupon 35 00

Amount to be paid $2,603 60

That he has further paid in accordance with the order of the court:

To Ch's Moran, trustee & commissioner, allowance and expenditures	$12,277 74
To Hunter & Daugherty, attornies, etc	24,600 00
To John McLean, clerk U. S. court, as per annexed voucher, marked A	170 14
To A. R. Dutton, master commissioner, as per annexed voucher B	200 00
To E. Gest, receiver, as per voucher C	597 00
For stamps, revenue, on deed to purchasers	793 15
Notary's certificate of acknowledgement of deed	1 00

And that he has further expended out of the amount of $11,043.12, ordered by the court to be retained for further orders of the court:

Advertisement of dividend, voucher D	$49 60
In settlement of judgment in case Geo. O. Deckelback vs. C. & Z. R. R. Co., as per voucher annexed, E	4,072 38
To Hunter and Daugherty, att'y's expenses in above suit, as per voucher F	106 73

And that there now remains in his hands, subject to the orders of the court, the sum of $7,082.26, out of the proceeds of the sale of the Cincinnati & Zanesville Railroad.

New York, 8th June, 1874.

CH'S MORAN,
Special Master Commissioner.

And afterwards, to wit, on the same day and year aforesaid came Erasmus Gest, receiver and special master commissioner, and
76 filed in the clerk's office of said court his final report in this case, clothed in the words and figures following, to wit:

Final report of E. Gest.

CHARLES MORAN, TRUSTEE,
vs.
THE CINCINNATI & ZANESVILLE RAILROAD Company.

The undersigned, receiver and special master commissioner in the above case, respectfully submits this his final report in the above case, for the approval and final closing of the trust.

Exhibit No. 1, with accompanying vouchers, show the receipts and expenditures to February 28th, 1870, and indicate the balance then in my hand, subject to order of court, to be $2,779.72.

Exhibit No. 2, with accompanying vouchers, show the receipts and expenditures to the time of making this report, June 19th, 1874, and show the balance now in my hands to be $1,051.67.

ERASMUS GEST,
Receiver and Special Master.

CINCINNATI, *June 19th*, 1874.

And afterwards, to wit, on the day and year last aforesaid, an entry was made on the journal of said court in said cause, in the words and figures following, to wit:

Receiver discharged.

CHARLES MORAN, TRUSTEE,
vs.
THE CINCINNATI AND ZANESVILLE RAILROAD Company et al.

77 This cause came on to be heard upon the report and vouchers filed by Erasmus Gest, receiver and special master commissioner, and the report and vouchers filed by Charles Moran, trustee, upon consideration whereof the court find the same to be correct, and the acts and doings of said receiver and special master and of said trustee are approved and confirmed.

And the court orders that there be paid out of the moneys and the lands of said Gest, receiver and special master commissioner, for expenses and fees in the case of Leander Hodge vs. The Cincinnati and Zanesville Railroad Company, in the supreme court of Ohio, to M. A. Daugherty, esquire, the sum of two hundred and thirty-one twenty-eight one-hundredths dollars ($231.28), and to Thomas Ambrose, clerk of this court, for his costs accrued to this date, the sum of one hundred and thirty-three ninety-five one-hundredths dollars ($133.95), and to Hoadly, Johnson & Colston, attorneys for said receiver, their fees earned by services to him, the sum of two hundred dollars ($200.00), and to himself, said Erasmus Gest, for his services as such receiver and special master commissioner, the sum of three hundred dollars ($300.00), and that the residue of said moneys in his hands, being the sum of one hundred and eighty-six sixty-four one hundredths dollars, be paid by said receiver to Charles Moran, trustee, to be by him held subject to the further order of this court ($186.64).

And upon such payments that said Gest, as such receiver and special master commissioner, go hence and be discharged on liability herein.

And the court find that of the sum ordered to be distributed to the holders of first mortgage bonds and
78 coupons by the said complainant $954,050 00
He has paid in that behalf 951,445 40

Leaving in his hands $2,603 60

coming to persons who have not demanded their dividend; and that of the other funds left in the hands of said complainant by the former order $49,950 00

He has paid out, in pursuance of the orders heretofore made, to himself $12,277 74
To Hunter & Daugherty 24,600 00
To John McLean, clerk 170 14
To A. R. Dutton 200 00
To E. Gest, receiver 597 00
For stamps on deed 793 15
To notary for acknowledgement 1 00
To G. O. Deckaback, judgm't 4,072 38
For advertisements 49 60
And to Hunter & Daugherty, expenses 106 73
Making 42,867 74

Leaving in his hands $7,082 26

And the court not being advised as to the proper disposition to be made of these balances in the hands of said trustee, and that which under this order he is to receive from said Gest as receiver, all questions with reference thereto are reserved, and this case is continued to the next term.

And afterwards, to wit, on the eighth day of August, in the year eighteen hundred and seventy-four, and entry was made in the journal of said court, in said cause, in the words and figures following, to wit:

Leave to file X bill.

CHARLES MORAN, TRUSTEE,
vs.
CINCINNATI AND ZANESVILLE RAILROAD Company. } In chancery.

79 On the application of Smith, Crawford and Young, solicitors for Francis Jeffery, administrator of the estate of William S. Zentmeir, deceased, to make the said administrator a party defendant to this action, and for leave to file his answer and cross-petition herein, and for good cause, by them shown, it is ordered, that complainant show cause why the said Francis Jeffery, administrator of William S. Zentmeir, deceased, should not be made a party defendant to this action, and leave be given him to file his answer and cross-bill herein, by the first day of the next term of this court. And if complainant shall fail to show cause, and no cause be shown by the time above fixed, that their said administrator be made a party defendant, and leave be given him to file his answer and cross-bill herein.

And afterwards, to wit, on the fifth day of November, in the year eighteen hundred and seventy-five, came the said Francis Jeffery, administrator, by Smith, Crawford and Young, his solicitors, and by leave of court first had and obtained, filed herein his certain answer and cross bill, clothed in the words and figures following, to wit:

Cross-bill.

CHARLES MORAN, TRUSTEE, COMPLAINANT,
vs.
THE CINCINNATI AND ZANESVILLE RAILROAD Company, et al., respondents. } In chancery. Answer and cross-bill.

80 Answer and cross-bill of Francis Jeffery, administrator of the estate of William L. Zentmier, deceased.

To the honorable the judges of the circuit court of the United States for the southern district of Ohio:

The respondent, Francis Jeffery, a citizen of the State of Ohio, resident in Warren County in said State, as administrator of the estate of William L. Zentmeir, deceased, who was a citizen of said State, and resident of said county at the time of his decease—who has on his own motion been made a party respondent herein, and has obtained leave to file this his answer and cross bill herein, now files the same against Charles Moran, trustee, the complainant in the original bill filed in this cause, a citizen of the State of New York, and resident of the city of

New York in said State, and against all others who are now parties to this cause; and for his said answer and cross-bill said Francis Jeffery, administr'tor as aforesaid, represents that on April 30th, A. D. 1869, the original bill in this cause, and its exhibits, were filed in this court by Charles Moran, trustee, as complainant—then, as now, a citizen of the State of New York—against the Cincinnati and Zanesville Railroad Company, a corporation under the laws of the State of Ohio, respondent; that the prayer of said original bill was that a mortgage made by said railroad company to said Moran, trustee, to secure certain bondholders in the sum of one million three hundred thousand dollars, should be foreclosed, and that the railroad of said company on which said mortgage had been given should be sold to pay said mortgage debt; that such proceedings were had in said court on said original bill;
81 that at the October term thereof, in the year 1869, on the 6th day of said month, a decree upon default was duly taken and entered in said court against said railroad company for the amount of said mortgage, and directing a sale of said railroad to pay the amount of said decree and costs, and that the funds arising from such sale should be brought into court for distribution; that such proceedings were afterwards had on said decree; that said railroad was duly sold to one Thomas L. Smith, and on the 2nd day of December, 1869, said sale was duly confirmed by said court, said sale being for the sum of one million and four thousand dollars; that such proceedings were afterwards had in said cause in said court; that all said purchase-money was distributed except the sum of seven thousand and eighty-two [illegible] dollars, which sum is now in the hands of said Charles Moran, as a special master commissioner of this court, subject to be yet distributed in this cause; that the claims and demands of all the other parties to this suit, except the claim and demand of this respondent hereinafter stated, and except a portion of the claim and demand of said Charles Moran as trustee under said mortgage, have all been paid off and satisfied.

And this respondent further represents that there was originally chartered and organized under the laws of the State of Ohio a certain railroad corporation under the name of the "Cincinnati, Wilmington and Zanesville Railroad Company," which company, under its charter, constructed a railroad from the city of Zanesville in Muskingum County, in the State of Ohio, to the town of Morrow, in Warren County, in the same State; that said last-named corporation having
82 become financially embarrassed and insolvent, and having mortgaged its said railroad and being unable to pay its obligations, secured by mortgage thereon, a mortgage on its said railroad was foreclosed in this court, and said railroad ordered to be sold, and such proceedings were had in this court under said foreclosure that said railroad was on the 10th day of June, 1863, sold under a decree of this court to Charles Moran, trustee for the creditors and stockholders of the said railroad company after the sale of its road as aforesaid was duly reorganized as the Cincinnati and Zanesville Railroad Company, now one of the respondents herein, on the 11th day of March, 1861, under a statute of the State of Ohio, relating to the sale and reorganisation of insolvent railroad companies, passed April 11th, 1861, entitled "An act to regulate the sale of railroads and the reorganization of the same," to which statute reference is herein made; that on the 12th day of March, 1864, said Charles Moran, who had purchased said railroad as aforesaid, but had taken the conveyance thereof in his own name, conveyed the same by deed to said reorganized railroad company, namely, the respondent railroad company herein. A copy of said deed is here-

with filed as an exhibit, and marked Exhibit No. 1, the original not being in the possession of this respondent; that a mortgage was then made to said Charles Moran, trustee, by the said reorganized railroad company of even date with said deed; a certificate copy is herewith filed as an exhibit and marked Exhibit No. 2, the same being also Exhibit A of said original bill; that said mortgage was given upon
83 the said railroad heretofore sold in this cause as aforesaid, being the railroad mentioned in said deed, and is the mortgage upon which complainant's bill is founded, and which has been foreclosed in this cause.

That said mortgage was originally made to Charles Moran and one William Schall, trustees, but that said William Schall declined to act as such trustee, while said Charles Moran on the other hand accepted said trust; that said deed and mortgage were delivered contemporaneously on the day of their date, namely, March 12, 1864; that the said railroad was operated as such by the respondent, the Cincinnati and Zanesville Railroad Company, under the said deed and mortgage from the date thereof till the time of the filing of the original bill herein; that it was provided and stipulated in said mortgage—see item first—that the possession of said railroad should be held by the said Cincinnati and Zanesville Railroad Company, and said railroad be operated and carried on by said company so long as no default was made in the payment of the sums secured to said trustees, and that it should be the duty of said company before declaring and paying any dividend to its stockholders to apply so much of the earnings of said company or the proceeds of its business as might be necessary to the fully paying off the current expenses and all balances in arrear of prosecuting and carrying on its business and the necessary expenses of keeping its road and rolling stock in repair; that it was further stipulated in said mortgage—see item second—that the said company being in the possession of said rail-
84 road should have the power to pay the money and income arising from the business of said railroad in payment of the expenses, both current and in arrear, of prosecuting and carrying on its said business and in payment of all necessary repairs. And that the directors of said company in prosecuting said business and applying funds as aforesaid, for all the purposes of said mortgage, should be deemed to be acting in trust for the use of the grantees of said mortgage, and all persons beneficially interested in the security intended to be effected by said mortgage, and that any breach of such trust should be a breach of the condition upon which said company was to retain the possession of said railroad; that it was further stipulated in said mortgage—item third, last clause—that the grantees thereof, in executing their trust and powers granted in said mortgage should not be held personally liable for any loss, accident, or injury that should happen to any person, but that the same, as far as legally chargeable against them, should be deemed a part of the expenses incident to the execution of said trust and powers and be paid or refunded out of the trust property, or the proceeds thereof, and that said grantees should have the right to retain therefor accordingly; that it was provided by the act under which the respondent railroad company was created and operated and under which said mortgage was made, namely, the aforesaid act, entitled "An act to regulate the sale of railroads and the reorganization of the same" (see 6th section), that the lien of any mortgage made by said company should be postponed to the lien of any judgement that should be recovered against said railroad company, after its reorganization, as afore-

said, for injuries thereafter suffered by the neglect, default, or misconduct of its agents.

And this respondent further says that on the 22nd day of June, 1866, said William L. Zentmeir, was, by the neglect, default, and misconduct of the agents of the respondent, the Cincinnati and Zanesville Railroad Company, crushed by the overturning of an engine on its said road, so that he then died of the injuries he there received by the negligence, default, and misconduct of the agents of said railroad company, and the said company became and was liable to his representatives under the laws of the State of Ohio for negligently causing the death of the said William L. Zentmeier, as aforesaid: that when said Zentmeier was so killed as aforesaid, and when the action hereinafter mentioned was begun by his administrator, the said railroad company, through its directors, were carrying on the business of and operating said railroad under the deed and trust mortgage aforesaid.

And this respondent further says that he was duly appointed and qualified administrator of the estate of said William L. Zentmeir, deceased, by the probate court of Warren County, Ohio, where said Zentmeir resided at the time of his death, and he is now such administrator, and that on the 16th day of July, 1867, he, as such administrator, duly commenced and action in the court of common pleas in and for Clinton County, Ohio, against said railroad company for the recovery of damages for negligently causing the death of said William L. Zentmeir, as aforesaid; that the appearance of the defendant in said action was
86 immediately effected; that said action continued pending until the 28th day of February, 1871, when said administrator duly obtained a judgement in said action against said railroad company for the sum of five thousand dollars and for his costs; that a part of the said costs has been paid, but that the said judgement remains in full force and effect, and is wholly unpaid; that no proceedings have been taken to reverse or modify said judgement, and there is now due said Francis Jeffery, as administrator of the estate of William L. Zentmeir, deceased, from the said Cincinnati and Zanesville Railroad Company on the said judgement five thousand dollars, and interest thereon to be computed at six per cent. per annum from the 28th day of February, 1871, and the unpaid costs taxed at one hundred and eighty dollars and forty cents, and interest on said costs from the date aforesaid: a certified transcript of said proceedings and judgement in said court of common pleas is herewith filed as an exhibit and marked Exhibit No. 3.

That said railroad company has no property of any kind subject to levy on execution at law, out of which said judgement or any part thereof can be made, nor has said company any assets, real or personal, out of which any part of said judgement can be made by proceedings at law, or in equity, except the said funds in the hands of said Charles Moran, as a special master commissioner in this cause as aforesaid. This respondent further says that the said judgement being for damages sustained by the negligence of the agents of said company since the said reorganization, and while the same was being operated under said deed and
87 trust mortgage, was the first and best lien on said railroad, and is the first and best li*ne* on the said proceeds of the sale thereof, and this respondent is entitled to full payment of said judgement, interest, and costs, and interest on said costs, before any payment is made of the bonds or coupons described in the original bill. And this respondent says that there now remains in the hands of Charles Moran, as special master as aforesaid, the said sum of seven thousand and eighty-two twenty six one-hundredths dollars of the proceeds of sale of said road

that has not been appropriated or disposed of by this court, which sum was reserved for the payment of such claims as should be liens superior to the lien of the mortgage described in the complainant's bill. And this respondent is now entitled to have the said fund applied to the payment of the said judgement against the Cincinnati and Zanesville Railroad Company, respondent.

This respondent therefore asks that he may file this his cross-bill, and that it may be received as a cross-bill and petition; that the complainant may be required to answer this cross-bill, and on final hearing complainant may be ordered to pay the claim of this respondent, as herein set forth, out of the proceeds of sale in his hands, as such master, and he prays for such other and general relief as he may be entitled to in equity.

SMITH, CRAWFORD & YOUNG,
Solicitors of the estate of Francis Jeffery,
Administrator of W. L. Zentmeir, dec'd, Respondent.

88 Exhibit No. 1, filed with said cross-bill, is in the words and figures following, to wit:

Exhibit No. 1.—*Received and recorded* 18*th May*, 1864.

Charles Moran, deed to Cincinnati and Zanesville Railroad Company.

Know all men by these presents, that Charles Moran, of the city of New York, the grantor in this deed named, at a public sale thereof had and made by William Key Bond, now deceased, in his capacity of receiver in a certain cause pending in chancery in the circuit court of the United States in and for the southern district of Ohio, wherein George S. Cole is complainant and the Cincinnati, Wilmington and Zanesville Railroad Company and others are defendants, in the life-time of the said William Key Bond, to wit, on the 27th day of August, A. D. 1863, by authority of an order of sale to him directed in said cause, became the purchaser in trust of the railroad and other property and franchises of said railroad company, which by the order aforesaid was directed and authorized to be sold, which sale was, at the October term, A. D. 1863, of said court, duly reported to and confirmed by said court, and the said receiver ordered and directed to convey the said railroad, other property, and franchises, by deed in fee simple, to the said Charles Moran, as by the records and files in that behalf in said court remaining more fully and at large appears. And be it further known that after the confirmation of said sale and before any conveyance was made by him in obedience to the order of the court in that behalf made as aforesaid, the said William Key Bond departed this life,

89 and thereafter, to wit, at the February term, A. D. 1864, of said court, David Hull was, by said court, duly appointed receiver and special master commissioner in the cause aforesaid in the place of the said William Key Bond, with all the same powers that had been conferred upon the said William Key Bond, and specially with power to convey to the said Charles Moran in virtue of his said purchase, the railroad, other property, and franchises aforesaid, as by the record and files aforesaid the same also further and more at large appears. And be it further known that the said David Hull, in execution of the power and authority so conferred upon him as aforesaid, did, in his said capacity of receiver and special master commissioner, on the 12th day of March, A. D. 1864, by deed in fee simple in due form of law executed

and delivered, convey to said Charles Moran the said railroad, and other property and franchises; for a full and particular description of the premises so conveyed to the said Charles Moran, reference is here made to said deed, and the record thereof to be made, the same being in trust as herein recited and mentioned. And be it further known that a meeting of the persons interested as beneficiaries under the said purchase by and conveyance to said Charles Moran in trust of said railroad, other property, and franchises, was held on the 10th day of March, A. D. 1854, in the city of Cincinnati, Ohio, for the purpose of reorganizing a body corporate under the original charter of the said Cincinnati, Wilmington and Zanesville Railroad Company, or to adopt such other form of corporate organization or otherwise to carry on or dis-
90 pose of said railroad property and franchises as should be agreed upon. To which meeting the said Charles Moran, in compliance with the request of said meeting, made his report in writing declaring the uses and trust of his said purchase and the names and proportions of interest of the individuals and persons beneficially interested under his said purchase, which report and declaration of trust was accepted by said meeting and adopted as evidence of said trust and of the interest of the beneficiaries thereof severally, subject to the terms and conditions set forth in the resolutions adopted by said meeting. To the record thereof and to the original report and declaration of trust so made by the said Charles Moran as aforesaid remaining in the custody of the body corporate hereinafter mentioned as the grantee of this deed, reference is here made for full particulars.

And be it further known that the said beneficiaries under said trust, at the meeting held by them as aforesaid, became organized as a body corporate by and under the corporate name of the Cincinnati and Zanesville Railroad Company, as in and by the record of the proceedings aforesaid of said meeting more fully appears; the board of directors elected by said meeting being therefore vested with full power and authority in right of the said beneficiaries, under the said purchase of the said Charles Moran, in their corporate capacity and in said corporate name, to take, hold, use, operate, carry on, own, mortgage, pledge, and by sale or otherwise to dispose of the said railroad, property, and franchises, in such manner as may, at the discretion of said board of directors and their successors, be deemed most expedient to accom-
91 plish the object of trust of the said purchase by the said Charles Moran, and promotive of the interests of said body corporate, subject to the restrictions and limitations prescribed by said meeting; and be it further known, that it was further ordered and prescribed by said meeting that it should be competent for the board of directors of said corporation, whenever so instructed by a majority of the stockholders thereof, at any meeting to be convened for that purpose upon the call of said directors, to accept of the provisions of the act entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," passed May 1st, 1852, in conformity with the provisions of section XV of said act. But in such event that the rights and interests of the persons beneficially interested under the trust of the said purchase of the said Charles Moran shall be carried out in every respect as if no such change had been effected, in conformity with the doings of said meeting; and that no act of said body corporate to be done, whether before or after any such acceptance, shall impair or affect the priority of lien intended to be secured in behalf of the holders of the first-mortgage bonds of said original Cincinnati, Wilmington and Zanesville Railroad Company; and that all mortgage

liens and incumberances to be created by said company as reorganized in conformity with the proceedings of said meeting, upon the property and franchises thereof, whether before or after any such acceptance as aforesaid of the provisions of the act aforesaid, shall, in express
92 terms to be embodied therein, be made subject and inferior to the lien of the bonds and mortgage to be given by said company in place of said original first mortgage, and the said original first-mortgage bonds, and the original mortgage given by said original company, shall not in any event be deemed to be paid or satisfied in whole or in part, except in so far as regards the amount of the dividend accruing thereto from the proceeds of the sale aforesaid to the said Charles Moran; but until actual and full payment of the principal of said bonds, remaining after the application of said dividend, with interest according to the terms thereof, from and after the first day of November, A. D. 1863, shall be made, shall, in law and equity, be deemed and holden as against said reorganized corporation and all others claiming and to claim through or under it, to be unpaid, outstanding and in full force, as a lien upon said railroad property and franchises; and as such shall inure to and for the benefit of the holders of the mortgage bonds to be made and given in lieu thereof by the said reorganized company:

Now, therefore, be it known to all whom it may concern, that the said Charles Moran, in consideration of the premises, and in execution of the trust for and upon which his purchase of said railroad, other property, and franchises was made as aforesaid, and in further consideration of one dollar to him in hand paid by the said Cincinnati and Zanesville Railroad Company, doth hereby grant, bargain, and sell, enfeoff, convey and confirm unto the said The Cincinnati and Zanesville Railroad Company, and to their successors and assigns forever, the said railroad, other property, and franchises so by him purchased at said receiv-
93 er's sale, and which has been conveyed to him by the said David Hull as receiver and special master commissioner as aforesaid, for a more particular and detailed description whereof reference is hereby made to the said deed of conveyance thereof so made by the said David Hull to him, the said Charles Moran, as aforesaid: To have and to hold the said granted and sold premises, and every part thereof, to the said The Cincinnati and Zanesville Railroad Company, its successors and assigns, forever; subject, nevertheless, to be held, used, operated, carried on, owned, mortgaged, pledged, and sold, or otherwise disposed of, to and for the use of the beneficiaries interested therein, under the purchase thereof by the said Charles Moran, herein recited and set forth in conformity with his report and declaration of trust herein referred to, and in conformity with the resolutions adopted at the meeting of the said beneficiaries hereinabove referred to, and so that the said granted and sold premises shall be held and remain reliable at all time' to be subjected in the hands of the grantee of this deed, its successors and assigns, as upon a mortgage thereof, to the payment of such part of the original first-mortgage bonds of the said original Cincinnati, Wilmington and Zanesville Railroad Company as have become entitled to the benefit of said trust, and which shall remain unpaid by dividends of the proceeds of the sale to said Moran, or otherwise, with interest on such balance from the first day of November, A. D. 1863, in conformity with the restrictions and limitations prescribed by the said meeting, hereinbefore recited and referred to said
94 original bonds, to be the first and paramount lien thereon, next to the charges herein reserved in behalf of the said Charles Moran, and to be retained as such for the benefit of the holders of like

amounts of a series of first-mortgage bonds to be secured on the same premises by mortgage or deed of trust to be made and issued by said grantee of this deed in substitution for said original bonds—said original bonds to be delivered by the holders thereof to the trustees of the mortgage so to be given to secure the bonds to be substituted therefor on the delivery of said substituted bonds to such holders, to be retained by said trustees for the benefit of such holders, as hereinabove provided and expressed; it being nevertheless hereby expressly reserved that the said Charles Moran have and retain a specific lien upon said granted and sold premises, to be paramount to the lien of all and every other claim or incumberance thereon, existing or to be created or suffered by the said Cincinnati and Zanesville Railroad Company, to secure and fully indemnify him against all loss, damage, or injury, debts, liabilities, or claims of whatsoever name or nature incurred or created as such purchaser as aforesaid, in trust, and in prosecuting and carrying on the business of said railroad at any time subsequent to said purchase, and to compensate him for his services in the management of said trust, and his expenses therein incurred, including counsel fees and the expenses incident to the corporate organization of the grantee hereof. In witness whereof the said Charles Moran hereto sets his hand seal this 12th day of March, A. D. 1864.

CHAS MORAN. [SEAL.]

95 Signed, sealed, and delivered in presence of us:
W. F. STRAUB,
FRED. A. LANE.

Stamped. U. S. inter. revenue. 100. Ten dollars conveyance; total amount of stamps, $1,000.00.
Countersigned: C. Moran, March 12th, 1864.

STATE OF OHIO,
Hamilton County, ss:

I certify that Charles Moran, the grantor of the within deed, personally came before me, a notary public in and for the county aforesaid, this day, and acknowledged the signing and sealing thereof to be his voluntary act and deed for the full purposes therein expressed and contained.

Given under my hand and notarial seal, at Cincinnati, in the county aforesaid, this 12th day of March, A. D. 1864.

[N. P. SEAL.] W. F. STRAUB,
Notary Public, Hamilton County.

STATE OF OHIO,
Hamilton County, ss:

I, S. T. Crawford, a notary public in and for the county and State above written, do hereby certify that the foregoing instrument was produced to me and I have carefully examined the same, and do find United States internal revenue stamps to the amount of one thousand
96 dollars attached and duly cancelled, as follows and by the following inscription: "C. Moran, March 12th, 1864." In testimony whereof I have hereunto set my hand and official seal this 23rd day of March, A. D. 1864.

[N. P. SEAL.] S. T. CRAWFORD,
Notary Public, Hamilton County, Ohio.

Stamped. U. S. inter. revenue. One five-cent certificate.
Countersigned: S. T. C., March 23rd, 1864.

Exhibit No. 2, referred to in said answer and cross-bill, appears of record herein, following the original bill of complaint.

Exhibit No. 3, filed and exhibited with said cross-bill, is in the words and figures following, to wit:

Exhibit No. 3.

Pleas, at Wilmington, within and for the county of Clinton and State of Ohio, began and holden on the 20th day of February, in the year of our Lord one thousand eight hundred and seventy-one, before the honorable Le Roy Pope, judge of the court of common pleas within and for the third subdivision of the second judicial district.

FRANCIS JEFFRAY, ADMIN., PLAINTIFF,
vs.
THE CINCINNATI AND ZANESVILLE RAILroad Co., def'ts.

Be it remembered that heretofore, to wit, on the 16th day of
97 July, A. D. 1867, the plaintiff, by Joseph McCray, his attorney, filed in the office of the clerk of our said court here his petition against the said defendant, in the words and figures following, to wit:

Court of common pleas, Clinton Co., O.

FRANCIS JEFFRAY, ADMIN. OF THE ESTATE OF William L. Zentmeyer, plaintiff,
vs.
THE CINCINNATI AND ZANESVILLE RAILROAD Company, def't. } Civil action. Petition.

Plaintiff says he was duly appointed and qualified administrator of William L. Zentmeyer, and as such administrator complains of the defendant, the Cincinnati and Zanesville Railroad Company, for that the said defendant, before and at the time of the committing of the grievances hereinafter mentioned, was the owner of a certain railroad, and ran locomotives and cars thereon that was moved and propelled by steam, and was by defendants used and employed in carrying passengers and goods upon and over said road, from the town of Morrow, in the county of Warren and State of Ohio, to the town of Zanesville, in the county of Muskingum and State aforesaid, and intermediate points and places on said road, and on the 22nd day of June, 1866, and for some time previous thereto, the decedent, William L Zentmeyer was,
and had been in the employ of defendant as an engineer, running
98 one of defendant's locomotives, at and for a certain time and reward agreed upon by the parties in that behalf, and it then and there became the duty of defendant to produce and provide a good, safe, and secure locomotive, secure and safe machinery, and a good, safe, and secure track, with smooth solid rails, and to look after said road and machinery of defendant, and keep the same in good repair and in a safe and secure condition, that the machinery of defendant's could be run upon said road with safety to passengers, to employees and all persons and property passing over defendant's said road. Yet the defendant, not regarding their duty in this behalf, so carelessly and negligently constructed their said road at and near the point where the Columbus,

Goshen and Wilmington Turnpike crosses defendant's road, east of the town of Clarksville, in the county of Clinton, and the point where the grievances were committed hereinafter complained of, as to make said road of defendant's unsafe and insecure after the falling of heavy rains, by building a small and narrow culvert, wholly insufficient to discharge the water that accumulates at the point aforesaid.

Plaintiff further says, defendant, on and before the 22nd day of June, 1866, suffered said culvert to fill up in part by logs, washing into and lodging therein, thereby obstructing the passage of the water, and caused the same to accumulate at the point aforesaid in great quantity, thereby breaking and washing away said culvert.

99 Plaintiff says, on the night of the 21st, and morning of the 22nd days of June, 1866, there fell in the vicinity of the above-described and along and on the road of defendant, a heavy rain, that swelled the streams, and washed away the culvert on defendant's road immediately east of the point where the turnpike aforesaid crosses defendant's road, and near the turnpike-bridge across Lytle's Creek, the said culvert and embankment being washed out, leaving a break of fifty feet in defendant's road, defendant well knowing that the time for the train to pass at the point aforesaid would be at four o'clock in the morning, and on the morning of the 22nd day of June, 1866, and after the rain-storm had passed, decedent, William L. Zentmeyer, engineer as aforesaid, agreeable to defendant's orders, attempted to pass over said road with his train and on the time aforesaid, and said defendants having neglected their duty in making examination and reporting injuries, and notifying engineer in charge of train of the condition of the track, and said decedent being then and there at his post on defendant's locomotive, and running said locomotive and train on said road, on the morning aforesaid, and being ignorant of the break in the track of said road, and said engine being propelled by steam ran forward and into said break, thereby precipitating said engine above down the embankment and in the bottom of the stream, thereby crushing and instantly killing said William L. Zentmeyer, who left surviving him a widow and children under the age of years without means of support, and who has been damaged thereby in the sum of ($5,000) five thousand dollars.

100 Wherefore plaintiff prays judgement against said defendant for the sum of five thousand dollars damages as aforesaid sustained.

JOSEPH McCRAY,
Att'y for Plaintiff.

Joseph McCray, being duly sworn, says he is the attorney of record of plaintiff in the aforesaid action, and that plaintiff is a non-resident, and absent from the county of Clinton, and this affiant says the several matters and things contained in the foregoing petition are, according to the best of his knowledge, and information, and belief, true in substance and in fact.

JOSEPH McCRAY.

Signed in my presence and sworn to before me this 16th day of July, 1867.

J. A. SMITH, *Clerk.*

I acknowledge myself security for costs in this action.

JOSEPH McCRAY.

Precipe.

Clinton com. pleas.

FRANCIS JEFFRAY, ADMI'R OF WILLIAM L. Zentmeyer, dec'd,
vs.
CINCINNATI AND ZANESVILLE RAILROAD COMPANY. } Precipe.

The clerk of said court will issue summons in this cause, directed to the sheriff of Hamilton County and State of Ohio for said company, returnable according to law. Plaintiff claims judgement for five thousand dollars ($5,000.00).

101

JOSEPH McCRAY, *Att'y.*

Thereupon was issued, out of the office of the clerk of our said court here, our writ of summons, directed to the sheriff of Hamilton County, Ohio, in the words and figures following, to wit:

THE STATE OF OHIO,
Clinton County, ss:

To the sheriff of the county of Clinton:

You are commanded to notify the Cincinnati and Zanesville Railroad Company, defendant, that it has been sued by Francis Jeffray, administrator of the estate of William L. Zentmeyer, deceased, plaintiff in the court of common pleas of Clinton County, and unless it answers by the 24th day of August, A. D. 1867, the petition of the said plaintiff against it, filed in the clerk's office of said court, such petition will be taken as true and judgement will be rendered accordingly.

You will make due return of this summons on the fifth day of August, 1867.

Witness my hand and the seal of the court, at Wilmington, this 16th day of July, A. D. 1867.

[SEAL.]

J. A. SMITH,
Clerk of the Common Pleas Court C. C. O.

102 Which writ was returned by the sheriff, endorsed as follows:

1867, August 2nd, served the within-named Cincinnati and Zanesville Railroad Co., by delivering a true copy of the within summons personally to James Pullen, auditor of said company, at the usual business office of said company, no other officer being found, and the said James Pullen being in charge of said office.

H. SCHLOTMAN,
S. H. Co.,
By L. O. FRANZ,
Dep'y.

Fees, $0.93.

Afterwards, to wit, on the first day of October, A. D. 1867, the defendant, by J. D. Wallace, their attorney, filed in the office of the clerk of our said court here their answer, in the words and figures following, to wit:

Court of com. pleas.

FRANCIS JEFFRAY, ADMIN. OF THE ESTATE OF William L. Zentmeyer, plaintiff,
vs.
THE CINCINNATI AND ZANESVILLE RAILROAD Company, def't.

No. 533. Civil action. Answer.

CLINTON CO., *ss:*

Now comes the said defendant, the Cincinnati and Zanesville Rail road Company, and for answer to the petition of the said Francis Jeffray, admin'r, &c., of William L. Zentmeyer, deceased, says, that
103 William L. Zentmeyer, deceased, at the time stated in plaintiff's petition, and for many years prior thereto, a locomotive engineer in the employ of the defendant, and was well acquainted with the location and condition of defendant's railroad; and defendant further says that on the 21st day of June, A. D. 1866, said railroad was in good repair and order, and perfectly safe at the place where the said William L. Zentmeyer was killed; that said culvert referred to in plaintiff's petition, which was destroyed, was on the night of the 21st day of June, 1866, in good order, free from drift or other debris; that said culvert was amply sufficient to pass all the water in the stream it was erected over, and was amply sufficient to pass all the water accumulating in said stream, and had for more than twelve years safely permitted the passage of all water which flowed through said culvert by said water-course; and the defendant further says that during the night of the 21st of June aforesaid, or on the morning of the 22nd, and during the hours of night, a severe and unusual storm of wind and rain passed over the country and vicinity of said culvert; that a large and unusual quantity of rain fell during the prevalence of said storm, flooding the lowland bottom and choking up the small stream in the vicinity of said culvert; that a large tree fell across and dammed up a certain other stream that, in its usual and natural course, did not flow through said culvert, thereby accumulating a large body of water in the stream and overflowed the a'jacent lands; that said water accumulated a large body of drift-wood and lumber from a portable saw-mill located in the
104 neighborhood; that said water forced a channel across the fields and flowed into the small streams passing through said culvert and carried with it the drift-wood and lumber aforesaid, thereby choking up said culvert and destroying the same, and also a large quantity of said railroad; that said storm and the unusual quantity of rain that fell during its prevalence was the cause, and only cause, of said accident, and the cause of decedent's death. That said William L. Zentmeyer had charge of the engine attached to the freight train passing over the road on the night of said 21st day of June, 1866, running between the city of Lancaster and village of Morrow, as stated in said petition, and run said engine and part of said train into said break during the storm aforesaid or immediately thereafter, thereby destroying said engine and cars, or nearly so, and caused the death of said decedent, for which this suit is brought.

Defendant further says that the engine and cars in charge of said decedent are in good order and repair and perfectly safe; that his death was not caused by any neglect or wrongful act of defendant; that said decedent was well acquainted with the danger of running said train during the prevalence of a storm, or immediately thereafter; that it was

his duty to strictly watch the track on such occasion, run slow, and be perfectly satisfied the road was safe; that defendant believes, and so avers, that if said decedent had strictly followed the above rules he would have discovered said break in time to have avoided the accident.

Defendant therefore avers that the proximate cause of said ac-
105 cident was the neglect of decedent in not obeying the above rules and running said train with more caution.

Defendant, therefore, denies that said railroad company has been guilty of any negligence in the premises, and denies that the death of the said William L. Zentmeyer was caused by defendant's neglect or by the omission of any duty incumbent on it; and further denies each and every allegation in said petition charging defendant with omission of duty and neglect in the premises; and having fully answered, prays to be dismissed and recover its costs.

J. D. WALLACE,
Att'y for Def'ts.

THE STATE OF OHIO,
Clinton County, ss:

Before the undersigned, a notary public in and for said county, personally came E. Gest, who, being duly sworn, says that he is the president of the Cincinnati and Zanesville Railroad Company, defendant in the above-named suit; that the statements made in the foregoing answer are true in substance and in fact, as he is informed and verily believes.

E. GEST.

Subscribed in my presence, and sworn to before me this 6th day of September, A. D. 1867.

JAMES PULLEN,
Notary Public for Hamilton Co., Ohio.

Notary fees, 40 cents, paid.

Afterwards, in the term of November of our said court, to wit, on the
18th day of November, A. D. 1867, before the honorable W. J.
106 Gilmore, judge, continued by consent.

Afterwards, to wit, on the 19th day of November, A. D. 1867, the plaintiff, by Joseph McCray, his attorney, filed in the office of the clerk of our said court here his motion, in the words and figures following, to wit:

FRANCIS JEFFRAY, ADMIN. OF WILLIAM L. Zentmeyer, pl'ff, *vs.* CINCINNATI AND ZANESVILLE RAILROAD CO., defendants. } Motion.

And plaintiff now comes and moves the court to strike out of the answer of defendant in this cause, as redundant and irrecellant matter, all of said answer save the latter clause, which denies the averments of the petition.

J. McCRAY,
Att'y for Plaintiff.

Afterwards, in the term of March of our said court here, to wit, on the 17th day of March, A. D. 1868, before the honorable George T. Smith, judge, continued by consent.

Afterwards, to wit, on the 17th day of June, A. D. 1868, the defendant, by I. D. Wallace, its attorney, filed in the office of the clerk of our said court here its amended answer, in the words and figures following, to wit:

107 Clinton com. pleas.

FRANCIS JAFFRAY, ADMIN. OF THE ESTATE OF William L. Zentmeyer, dec'd, defendant, *vs.* THE CINCINNATI AND ZANESVILLE RAILROAD Company. } No. 53. Amended answer.

And now comes the defendant, and for further answer to the petition of plaintiff says that the said William L. Zentmeyer, dec'd, was well acquainted with the location of the road where he lost his life; that he was a regular engineer of the company, and had for many years been running locomotive engines over defendant's road; that some time during the 20th or 21st of June, A. D. 1866, a sudden and unusual quantity of rain fell in the neighborhood and vicinity where said road and culvert was washed away, during the prevalence of a sudden and unusual storm; that they were indications of danger along the line of said road; the fields were overflowed with water, and the running streams between the towns of Wilmington and Clarksville were unusually swollen and rapid. All of which was seen and came to the knowledge of said decedent, who had charge of the engine running and operating said train thereto attached; and by the rules and instructions of said company given to engineers it was and became the duty of William L. Zentmeyer, engineer of said train, to run and operate said engine with the greatest caution for the safety of said train and the persons and property thereon; that it was the duty of said deceased to run slow, and in case of uncertainty or doubt as to
108 the safety of the road, it was the duty of said engineer to send a man ahead of the train and examine the track. That a short time before said accident occurred said deceased did stop his train at or near Lytle Creek, in the vicinity of said accident, and east of the place where it occurred, having become alarmed at the severity of the storm and the unusual quantity of water on the ground. And the defendant further says that it became the duty of said deceased, as engineer of said train, to stop the same until he was fully assured of the safety of the road, and if he did run at all under such circumstances, it was his duty to have run very slow and with the utmost caution, and to have a man sent ahead to examine said road and track, and be fully assured of its safety, and to have preserved this course until all danger was passed. Yet the said William L. Zentmeyer wholly disregarded his said instructions and neglected to stop said train until he was assured of the safety of the road, and neglected and failed to send a man ahead of said train to examine said road, and failed and neglected to cautiously run said train; but, on the contrary, he ran said train in a careless, reckless manner, and at unusual speed, to the great danger of the same, and lost his life and destroyed said engine and a number of cars by his negligence aforesaid, by running said engine at a high, unnecessary, and unusual rate of speed, into a break in said road, where the same was destroyed by said storm and broken by the waters aforesaid, and the defendant avers that said accident was

109 caused by the neglect and carelessness of said deceased engineer, and not by the carelessness or neglect of said defendant.

J. D. WALLACE,
Att'y for Def't.

THE STATE OF OHIO.
HAMILTON COUNTY, *ss:*

E. Gest, being duly sworn by the undersigned, a notary public in and for said county, says that he is the president of the Cincinnati and Zanesville Railroad Company, and, *is* he is informed and believes, the statements in the above answer are true.

E. GEST.

Subscribed in my presence and sworn to before me this 12th day of June, A. D. 1868.

JAMES PULLEN,
N. P., H. C., O.

Fee 40 c., paid.

Afterwards, in the term of June, A. D. 1868, of our said court, this cause was continued.

Afterwards, to wit, on the 3d day of December, A. D. 1868, the plaintiff, by Joseph McCray, his attorney, filed in the office of the clerk of our said court here his reply, in the words and figures following, to wit:

Reply lost.

Afterwards, in the term of November of our said court here, to wit, on the 3d day of December, A. D. 1868, before the honorable George I. Smith judge, on motion of the court, by Joseph McCray, attorney for plaintiff, and it being made to appear that Elias Gant and D. P. McKinzie were duly subpœnaed personally to appear at the present term of this court to testify on behalf of plaintiff, and that they have made default
110 for the said Elias Gant and D. P. Kinzie: It is therefore ordered that a rule issue to show cause why they should not be attached for not attending as witness in said action in obedience to the command of said subpœna.

And now come the said parties by their attornies, and thereupon came a jury, to wit, J. T. Starbuck, Frank Spencer, Asa Jenkins, Milton Spencer, Moraicia Hines, David Marble, George Bond, Azel Walker, John Lewis, Achilles Whinnery, E. M. Crawford, and David James, who were duly empanneled, sworn, and affirmed; the truth to speak upon the issues joined between the parties; and the evidence having been heard in part, the jury was cautioned by the court and discharged until half past eight o'clock to-morrow morning.

Afterwards, in the term last aforesaid of our said court, to wit, on the 4th day of December, A. D. 1868, before the hon. judge last aforesaid, came the aforesaid jury, as per minutes of yesterday, and the evidence being heard the jury was again cautioned and discharged until half past eight o'clock to-morrow morning.

Afterwards, in the term last aforesaid of our said court here, to wit, on the fifth day of December, A. D. 1868, before the hon. judge last aforesaid, come the said parties by their attorneys, and thereupon came the aforesaid jury, as per minutes of December 3rd, 1868; and the arguments being heard in part, the jury was again cautioned and discharged until 9 o'clock Monday morning next.

Afterwards, in the term last aforesaid of our said court here, to wit, on the 7th day of December, A. D. 1868, before the hon. judge last aforesaid, came the said parties by their attorneys, and thereupon came the aforesaid jury, as per minutes of December 3, 1868; and the arguments not being concluded, the jury was again cautioned and
111 discharged until half past eight to-morrow morning.

Afterwards, in the term last aforesaid of our said court here, to wit, on the 9th day of December, A. D. 1868, before the honorable judge last aforesaid, came the said parties by their attorneys, and thereupon came the aforesaid jury, as per minutes of Dec. 3, 1868, who, upon their oaths and affirmations aforesaid, and after twenty hours' consultation, do return into court here and report they failed to agree upon a verdict, and were discharged and cause continued.

Afterwards, in the term of March of said court here, to wit, on the 23rd day of March, A. D. 1869, before the Hon. Le Roy Pope, judge, continued at costs of defendant.

It is therefore considered by the court that the said plaintiff recover of the said defendant his costs herein at this term expended, taxed to $8 and leave to plaintiff to reply by the fifth day of April, A. D. 1869, came filed in the words and figures following, to wit:

Clinton com. pleas.

FRANCIS JEFFRAY, ADMIN. OF THE ESTATE OF William L. Zentmeyer, pl'ff.
vs.
THE CINCINNATI & ZANESVILLE R. R. Co., defendant. } Reply.

Plaintiff, for reply to defendant's answer, denies that the said William L. Zentmeyer, deceased, was instructed by defendant to stop his trains on the road of defendant in case of a storm or heavy fall of rain until he was notified that the track on their said road was safe to
112 run their engines and train upon. He further denies defendant's answer, and says it is untrue that deceased as engineer had instructions from said railroad company to stop his train and send a man ahead of said train to look for danger and report the same to said engineer. On the contrary, he avers that by the terms of same the instructions pointed and given to said engineer by said company, only to guide him, the said engineer, in running his said train, and the only instruction given him, the said William L. Zentmeyer, engineer as aforesaid, to guide and direct him in the management of his said engine, was that he should be subject to the orders and control at all times of the agent of said company, who was put in charge of their said train as conductor of the same, and who, by the instruction os said company, controlls all persons employed on their said trains. He further avers that all carelessness in running of the train that killed said William L. Zentmeyer was the negligence and carelessness of the agent of the company controlling said train as conductor thereof, and not the fault of said deceased engineer.

Plaintiff, further replying, avers the instruction of said company, printed and furnished by said company to all employees on their said road, to direct said employees in the discharge of their respective duties toward said company, directs the road master, as agent of said company, *to make*, in case of a storm or heavy rain, to inspect the

track of their said railroad by sending some one over their said road immediately after a storm and before any train should pass, to examine the same and report any danger to said road that would impede the running of trains thereon, or would in any way affect the security
113 of passengers of trains. He further replies to said answer of defendant and says it is untrue that said engineer on the evening of the 21st and morning of the 22nd of June ran his engine in a careless or reckless manner, and at a high and unusual rate of speed, and denies that the said accident was caused by fault of said deceased engineer. And having fully replied to defendant's answer, asks judgement as in his second said petition.

Mc. CARY, DEAN & MILLS,
Att's for Plaintiff.

Joseph Mc. Cary, being duly sworn, says he is the attorney of record in the aforesaid action, and that the said plaintiff is a non-resident of the county of Clinton, and that the matters and things set forth in the foregoing answer are true in substance and in fact, according to the best of his knowledge, information, and belief.

JOSEPH Mc. CARY.

Sworn to before me and subscribed in my presence this third day of April, A. D. 1869.

G. P. DUNHAM,
Dep'y Clerk.

Afterwards, in the term of June of our said court here, to wit, on the 22nd day of June, A. D. 1869, before the hon. judge last aforesaid, on motion of defendant's attorney, this cause is continued at def't's cost.

It is therefore considered by the court that the said plaintiff recover of the defendant his costs herein at this term expended, taxed to $.

Afterwards, to wit, on the 30th day of November, A. D. 1869,
114 the plaintiff, by Mills and McVey, his attorneys, filed in the office of the clerk of our said court here his motion in the words and figures following, to wit:

Clinton com. pleas.

FRANCIS JAFFRAY, ADMIN., *vs.* THE C. & Z. R. R. CO. } Motion.

And now comes the plaintiff and moves the court here to strike the deposition of E. Gest, O. W. Shattuch, and Andrew Tackson from the files in the above case upon the ground that the notice upon which the deposition was taken is insufficient.

2. That the deposition does not show that the said Andrew Tackson is not a resident of the county of Clinton and State of Ohio.

Afterwards, in the term of November of our said court here, to wit, on the 3rd day of December, A. D. 1869, before the Ho. Le Roy Pope, come the said parties by their attorneys, and thereupon came a jury, to wit, Nathan Roberts, James Colvin, Thomas J. Whinnery, Neptia Gallup, Joshua Lacy, J. J. Dryden, Amos Moon, Solan Carroll, T. C. Moris, Joseph Smith, Joseph Boswell, and Bruce Reed, who were duly empanelled, sworn,

and affirmed the truth to speak upon the issues joined between the parties, who, upon their oaths and affirmations aforesaid, do return into court here their verdict in writing, in the words and figures following, to wit:

We, the jury, find for the plaintiff, and assess his damages at five thousand dollars.

THOMAS J. WHINNERY,
Foreman.

115 It is therefore considered by the court that the said plaintiff recover of the said defendant the sum of five thousand dollars, his damages so as aforesaid assessed, and also his costs herein expended, taxed to $.

Afterwards, in the term last aforesaid of our said court, on the 4th day of December, A. D. 1869, before the hon. judge last aforesaid came the said defendant by his attorney, and moves the court for a new trial herein, for reasons on file, in the words and figures following, to wit:

Clinton common pleas.

JEFFRAYS, ADMIN. OF ZENTMEYER, DECEASED, vs. THE CINCINNATI AND WILMINGTON RAILROAD Company. } Motion.

The defendant moves the court for a new trial herein and assigns the following reasons therefor:

1. The verdict is contrary to the evidence, law, and charge of the court.
1. The court admitted improper evidence.
3. The court excluded proper and important evidence.
4. The court in not instructing the jury as requested by defendant's counsel.
5. The damages are excessive.
6. The verdict should have been returned in favor of defendants.

116 7. For newly discovered evidence.

J. D. WALLACE,
Atty.

Afterwards, in the term last aforesaid of our said court here, to wit, on the 19th day of January, A. D. 1870, before the hon. judge last aforesaid, came the said parties, by their attorneys; and thereupon this cause came on for hearing upon the motion of the defendant to set aside the verdict of the jury heretofore rendered, and was argued by counsel, in consideration whereof the court do sustain said motion and order said verdict set aside, and grant a new trial herein on condition that the said defendant paying the costs of this suit expended at this term, taxed at $, and in default of payment of such costs on or before the (20th) twentieth day of February, 1870, the judgment to stand as hereinbefore rendered.

Afterwards, in the term of March of our said court here, to wit, on the 7th day of March, A. D. 1870, before the honorable judge last aforesaid continued on application.

Afterwards, in the terms of June and November, A. D. 1870, of our said court this cause was continued.

Afterwards, in the term of November of our said court here, to wit, on the 28th day of February, A. D. 1871, before the Hon. Le Roy Pope, judge, came the said plaintiff by Joseph McCray, his attorney, and the said defendant not represented by counsel, and thereupon came a jury, to wit, Albin Micus, John Stackhouse, John Surmis, Samuel Williamson, Joseph C. Wickersham, W. T. Kline, G. R. Jackson, T. A.
117 Moon, Jonathan Smith, Robert Moon, W. O. Turner, and Henry Compton, who were duly empanelled, sworn and affirmed the truth to speak upon the issues joined between the parties, who, upon their oaths and affirmations aforesaid, do return into court here their verdict in writing, in the words and figures following, to wit:

We, the jury, find for the plaintiff damages to the amount of five thousand dollars.

J. C. WICKERSHAM,
Foreman.

It is therefore considered by the court that the said plaintiff recover of the said defendant the said sum of five thousand dollars, his damages so as aforesaid assessed, and his costs herein expended, taxed to $.

THE STATE OF OHIO,
Clinton County, ss:

I, L. A. Reed, clerk of the court of common pleas within and for the county aforesaid, do hereby certify the within and foregoing to be a full, true, and correct transcript of the record in the case wherein Francis Jaffray, administrator of Wm. L. Zentmeyer, was plaintiff, and the Cincinnati and Zanesville Railroad Company defendant.

Witness my hand and the seal of the court, at Wilmington, this 8th day of October, A. D. 1874.

[SEAL.]

L. D. REED, *Clerk*,
By T. N. HARLAN, *Dep'y.*

118 And afterwards, to wit, on the day and year aforesaid, came the said Charles Moran, trustee, by M. A. Daugherty, his solicitor, and filed in the clerk's office of said court his certain demurrer to said cross-bill, clothed in the words and figures following, to wit:

Demurrer.

CHARLES MORAN, TRUSTEE, *vs.* THE CINCINNATI AND ZANESVILLE RAILROAD Company, Francis Jeffrey, administrator of William L. Zentmeyer, deceased, and others.	In chancery.

The several demurrer of Charles Moran, trustee, one of the defendants to the cross-bill of Francis Jeffrey, administrator of William A. Zentmeyer, deceased, to the said cross-bill.

This defendant to said cross-bill, by protestation, not confessing any of the matters in and by said cross-bill complained of to be true in manner and form as in the same are set forth, says that he is advised that there is no matter or thing in said cross-bill good and sufficient in law to call this defendant thereto to account to this honorable court for the same; b't that there is good cause of demurrer thereunto, and

he does demur accordingly, and for cause of demurrer says that said cross-bill, in case the same were true, contains no matter of equity whereon this court can ground any decree or give complainant in said cross bill any relief as against this defendant to said cross-bill.

119 Wherefore, and for divers other errors in said cross-bill contained and appearing on the face thereof, this defendant thereto does demur thereto, and humbly craves the judgment of this honorable court whether he is compellable or ought to make any answer thereunto otherwise than as aforesaid. And this defendant humbly prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

M. A. DAUGHERTY,
Solicitor for Charles Moran, Trustee.

I certify that in my opinion this demurrer is well founded in point of law; and I further certify that the same is not filed for delay.

M. A. DAUGHERTY,
Solicitor for Charles Moran, Trustee.

And afterwards, to wit, on the day and year last aforesaid, an entry was made in the journal of said court in said cause, clothed in the words and figures following, to wit:

Entry sustaining demurrer.

CHARLES MORAN, TRUSTEE,
vs.
THE CINCINNATI & ZANESVILLE RAILROAD Company et al. } Chancery. Demurrer sustained.

120 This day this cause came on to be heard on the motion of Francis Jeffrey, administrator of William L. Zentmeyer, deceased, for leave to be made a party defendant herein, and for leave to file a cross-bill herein, and was argued by counsel; on consideration whereof the court sustain said motion, and order that said Jeffrey, as administrator as aforesaid, be, and he hereby is, made a defendant herein, and leave his given to him to file said cross-bill, which is accordingly done. And thereupon comes said Charles Moran, trustee, and enters his appearance herein to said cross-bill, and leave is given to said Charles Moran, trustee, to file a demurrer to said cross-bill; and said demurrer being filed this cause came on further to be heard on the said cross-bill and demurrer thereto, and was argued by counsel; on consideration whereof the court do sustain said demurrer. Wherefore it is considered, adjudged, and decreed by the court here that said cross-bill of said Jeffery, as administrator as aforesaid, as to said Charles Moran, trustee, be, and the same is, dismissed. And that said Charles Moran, trustee, as to said cross-bill, go hence without day, and recover of said Jeffery, as administrator as aforesaid, his costs herein expended, taxed at $. To all of which the said Francis Jeffery, administrator of William L. Zentmeyer, deceased, excepts. And defendant, Francis Jeffery, administrator of William L. Zentmeyer, deceased, gives notice of his intention to appeal from the above decision of this court to the Supreme Court of the United States, and now demands the said appeal; and the court, finding this cause is appealable to the Supreme Court of the United States, do allow and grant said appeal on the appellant, Francis Jeffery

executing a bond therefor to the satisfaction of this court in the
121 sum of one thousand dollars.

And afterwards, to wit, on the 30th day of December, in the year 1875, came the said Francis Jeffery, administrator, and filed in the clerk's office of the court aforesaid a certain appeal bond in said cause, clothed in the words and figures following, to wit:

Appeal bond.

FRANCIS JEFFERY, ADMIN.,
vs.
CHARLES MORAN, TRUSTEE.

Know all men by these presents, that we, A. J. White and Amor Smith, jr., of Cincinnati, Ohio, are held and firmly bound unto Charles Moran, trustee, in the sum of one thousand dollars, to be paid to the said Charles Moran, trustee, his executors or administrators; to which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators firmly by these presents, sealed with my seal, dated this 30th day of December, A. D. 1875.

Whereas Francis Jeffery, admin., hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree entered in the above entitled action by the circuit court of the United States for the southern district of Ohio: Now, therefore, the condition of this obligation is such that if the above-named Francis Jeffery, admin., shall prosecute his said appeal to effect and answer all costs if he shall fail
122 to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

A. J. WHITE. [SEAL.]
AMOR SMITH, JR. [SEAL.]

Witness:
THOS. AMBROSE.

123 THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing transcript to be truly taken and copied from the final record in the case of Charles Moran vs. The Cincinnati & Zanesville Railroad Co. *Company*, as the same is kept in the clerk's office of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Cincinnati this twenty-sixth day of September, A. D. 1876, and of the Independence of the United States of America the one hundred and first.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk U. S. Circuit Court S. D. Ohio.

(Indorsement on cover:) No. 271. Francis Jeffrey, administrator of William L. Zentmeyer, dec'd, appellant, vs. Charles Moran, trustee. S. Ohio C. C. U. S. Filed 16th October, 1876.

Spencer & Craig Pr. Wks., 169 & 171 Race St., Cin'ti

No. 271.

IN THE

Supreme Court of the U. S.

F. JEFFERY, Administrator of Zentmeier,
Appellant.

vs.

CHARLES MORAN, Trustee, and others,
Appellees.

IN CHANCERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLANT,

By S. T. Crawford.
Thomas L. Young and
Ransford Smith.

IN THE SUPREME COURT

OF THE UNITED STATES.

Francis Jeffery as Administrator of the estate of William L. Zentmeier, deceased, Appellant,
vs.
Charles Moran, Trustee, Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

Francis Jeffery as administrator of the estate of Wm. L. Zentmeier, deceased was on his own motion made a party Defendant in the cause of Charles Moran, trustee, *vs.* the Cincinnati and Zanesville Railroad Company, *et al* in the U. S. Circuit Court for the Southern District of Ohio. (See 38 page of record.) He then filed his cross-bill therein to which Charles Moran, trustee, filed a general demurrer. (See 56 page of record.)

The demurrer was sustained, the cross-bill dismissed, and Jeffery appealed. Record page 57.

The facts set forth in the cross bill are substantially as follows: See pages 38, 39, 40, 41 and 42.

That there was in Ohio the Cincinnati *Wilmington* and Zanesville Railroad Company, which at one time owned and operated a railroad from the city of Zanesville to the town of Morrow.

That said company became insolvent, and its road and franchises were sold under proceedings in said Circuit Court to Charles Moran, trustee for the creditors and stockholders of said company, on June 3rd, 1863.

That said Railroad Company after the sale of its road was *reorganized* under the name of the Cincinnati and Zanesville Railroad Company, on March 11th, 1864, under a statute of Ohio relating to the sale and reorganization of insolvent railroad companies, passed April 11th, 1861. (See statute in appendix hereto); that on March 12th, 1864, Charles Moran who had purchased said road as a trustee, conveyed the same to the reorganized company, namely, the Cincinnati and Zanesville Railroad Company, one of the respondents below and received from said company the mortgage to him as trustee, for the foreclosure of which this action was brought below. (See exhibits one and two of the cross-bill); that said railroad was operated by the reorganized company from the date of said deed until the road was placed in the hands of a receiver by the court below in this case.

The said mortgage contained the following clauses: Page 15.

"That the possession of the said railroad should be held by the said Cincinnati and Zanesville Railroad Company, and said railroad be operated and carried on by said company so long as no default was made in the payment of the sums secured to said trustees, and that it should be the duty of said company before declaring and paying any dividend to its stockholders to apply so much of the earnings of said company or the proceeds of its business as might be necessary to fully paying the current expenses and all balances in arrear of prosecuting and carrying on its business and the necessary expenses of keeping its road and rolling stock in repairs." (See item first of the mortgage,) page 15 of record.

And that it was further set forth in said mortgage. See page 15 of record.

"That the said company being in the possession of said railroad should *have the power to pay the money and income arising from the business of said railroad in payment of the expenses both current and in arrear of prosecuting and carrying on the said business and in* payment of all necessary repair and that *the directors of said company in prosecuting said business and applying funds as aforesaid for all the purposes of said mortgage, shall be deemed to be acting in trust for the use of the grantees of said mortgage and all persons beneficially interested in the security intended to be effected by this mortgage*, and that any breach of trust should be a breach of the condition upon which said company is to retain the possession of said railroad." (See item second) on page 15.

And it was further provided in said mortgage. See page 18.

"That the grantees thereof in executing their *trust* and powers granted in said mortgage, should not be held *personally liable for any loss, accident or injury that should happen to any person, but that the same so far as legally chargeable against them, should be deemed a part of the expenses, incident to the execution of said trust and powers, and be paid or refunded out of the trust property or the proceeds thereof, and that said grantees should have the right to retain therefor accordingly.*" (Item third, last clause.)

The cross-bill further shows: Page 41.

That on the 22nd day of June, 1866, Wm. L. Zentmeier was killed by negligence of employes of the Cincinnati and Zanesville Railroad Company, in operating the road. That on the 16th day of July, 1867, an action was brought by his administrator against the Cincinnati and Zanesville Railroad Company, for damages for causing the death of Zentmeier, in the Court of Common Pleas of Clinton County, Ohio; that Defendant, the Cincinnati and Zanesville Railroad Company, in that action was served and filed its answer and the action remained pending on the 30th day of April, 1869, when complainant below filed his bill in this cause for the foreclose of his mortgage and the sale of the mortgaged premises.

That on October 16th, 1869, the Court below decreed the foreclosure and sale of the mortgaged premises. And the road was on December 2nd, 1869, sold to Thos. L. Jewet, for the sum of $1,400,000.00 and the sale was confirmed by the Court and the proceeds of sale ordered to be paid to the costs of the action and to the bondholders under the said mortgage, except the sum of $7,082.26 which yet remains at the disposal of the Court in the hands of the Special Master, who made the sale. That the proceeds of sale were insufficient to pay complainants mortgage in full.

That the action of Jeffery, Administrator against the Cincinnati and Zanesville Railroad Company, in the Clinton County Common Pleas Court, was actively prosecuted until February 28th, 1871, when the said Administrator, the Appellant here duly obtained a judgment for $5,000.00 and costs against the Cincinnati and Zanesville Railroad Company, which judgment remains in full force and wholly unpaid.

That there is no property of the said Railroad Company out of which any part of said judgment can be made, except the said sum of $7,082.26 in the hands of said Special Master.

Appellant claimed in his said cross-bill that his judgment was a lien on the proceeds of sale paramount to the lien of Complainant's

mortgage, and asked the Court to appropriate out of the proceeds of sale yet remaining at the disposal of the Court, sufficient for the payment of said judgment.

The dates of these transactions are as follows:

1861, April 11th, law authorizing reorganization passed. March 11th, 1864, reorganization effected. March 12th, 1864, the railroad deed from Moran to the Cincinnati and Zanesville Railroad Company and mortgage from Cincinnati and Zanesville Railroad Company to Moran, trustee. In the year 1866, June 22nd, Zentmeier killed by the negligence of the employees of the Company. 1867, July 16th, Zentmeier brought suit in Clinton Common Pleas. 1869, April 30th, complainant Moran's bill filed to foreclose his mortgage. 1869, October 16th, railroad sold to Jewet. 1871, February 28th, Zentmeier's Administrators recovered judgment. 1875, November 5th, Jeffery, Administrator of Zentmeier made party and filed his answer and cross-petition to enforce lien, and in the nature of a creditors bill.

ARGUMENT.

The Appellant Jeffery, Administrator of Zentmeier, deceased, claimed below, and now claims that he is entitled to have his judgment paid out of the proceeds of the sale of the said railroad on three different grounds. FIRST—Because in *fact* the complainant Moran and those he represents as Mortgagees and Bondholders were at the time of the injury to Zentmeier, the *actual owners* of the said railroad and were in fact actually *operating* the same and were actually liable to Zentmeier for the acts of the said Railroad Company, their trustee.

SECOND—Because in the mortgage under which complainant below claims that he is entitled to the proceeds of sale, it was stipulated and agreed that the claim of Jeffery or *all claims for expenses in operating the road* should be paid out of the proceeds, and complainant agreed to and did wave the lien of his mortgage to the payment of the expenses of operating the road.

THIRD—Because the law under which the said railroad was reorganized and operated, provided that the lien of Complainant's mortgage should be postponed to the liens of judgments obtained against the Railroad Company for injuries suffered by negligence of any employee of the said railroad (see appendix). Of these, in their order:

I.

We observe that the complainant Moran originally pur-

chased the road as a trustee, brought this action as a trustee, and holds the funds as a trustee; and at the time of the making of the mortgage and ever since the property was the property of an insolvent corporation. And it appears that it was always known by all the parties that both the corporations were insolvent.

"The law declares that the property of a corporation, is a trust "fund for the benefit of creditors and stockholders."

Goodin *vs.* Whitewater Canal, 18th, O. S. R., 169.

Sawyer *vs.* Hoag assignee, 17th, Wal., 610.

In the habendum clause of the deed, we find the following:

"Subject, nevertheless to be held, used, operated, carried on, "owned, mortgaged, pledged and sold or otherwise disposed of *to* "*and for the use of the beneficiaries* interested therein, under the "purchase thereof by the said Charles Moran, herein recited and "set forth in conformity with his report and declaration of trust "herein referred to." See page 44 of record.

It has since developed that the beneficiaries are only complainant and those he represents.

Also that in the mortgage of Complainant it was provided that the directors of the said Railroad Company in prosecuting said business and applying [illegible] as aforesaid, for all the purposes of said mortgage *shall be deemed to be acting in trust for the use of the grantees of said mortgage* and all persons beneficially interested in the security intended to be effected by said mortgage. Thus we find it actually expressed by the parties, that the understanding and intention of the parties to the mortgage between themselves, was: that the corporation called the Cincinnati and Zanesville Railroad Company was a mere fiction, or at most a mere trustee or imaginary shield for the mortgagees. In any controversies between the mortagees and the Corporation, it was convenient and useful to claim that the Corporation was a trustee for these Mortgagees. But when a creditor of the Corporation intervenes, then these beneficiaries are Mortgagees of the road and claim priority as such.

It is clear, the whole property was not worth the $1,300,000 at the time of the reorganization, or the holders of this debt would not have gone into the reorganization, but have sold the road and got their money. Finding the Road could not be made to pay this debt by sale, then, or even a portion of it; it became necessary for the *Bondholders* to arrange to continue the business of the Road in order to get anything out of it. They then surrendered up their bonds and had new bonds and mortgages issued to them, extending pay-

ment for thirty (30) years at seven (7) per cent. interest. *This is the same old debt extended*, and in order to give the appearance to this transaction that they are Bondholders, they take the new bonds secured by mortgage and appear again as Bondholders and Creditors of the Cincinnati and Zanesville Railroad Company. It nowhere appears there was any stock issued, or that any person appeared for the stockholders. We thus see, that, *in fact, the first mortgage of* $1,300,000 was all the capital and stock of the Road, and Complainant and those he represented, did, in fact, own and represent, all there was of capital stock or bonds of this Road, from the time of capitalization or reorganization, till the sale of the Road. This reorganization as it was called, *in fact*, was nothing other than an arrangement by the holders of this mortgage to operate and run the Road for their benefit, until they had a favorable time to realize by a sale of the property: nothing else was intended, and nothing but the expenses of operating the Road, was allowed to be paid by the mortgage; and after expenses all the residue was to be paid to the interest on the mortgage: and in fact, during the time the Road was run under the reorganization, as it now appears, there was not enough received to pay the expenses of operating it and the interest on the bonds, represented by Complainant; and it was apparent this would be the fact at the time the Road was reorganized. Now this is and was in fact nothing but a Railroad owned, run and operated by the owners of the *first* mortgage. All the proceeds and earnings of the Road, from the capitalization until the sale, after payment of the expenses of operating the Road, was paid to the Mortgagees. This then being the case in equity, this Court looks at the parties as they were, and will not distinguish between Stockholders and Mortgagees if their relation to the Road was the same.

"The *form* which the parties may have seen proper to give "their contract, is by *no means conclusive of its real character*, for the "law may not be evaded by any artifice or device of the parties; "the question is not, what have they called the transaction, but what "do the facts and circumstances require the *Court* to call it."

Corcoran & Riggs *vs.* Powers, et al, 6th O. S. R., 37.

If the Complainant had represented stock instead of bonds, of course Jeffery's judgment would have to be first paid. In this case, Complainant, in the bonds, held all that there was of the Road, and in fact, the owners of these bonds, were the owners of the Road and should in equity be considered as the stockholders and owners of the road.

The Complainant, and those he represented, became stockholders so far as such a Company can be said to have stockholders, by accepting bonds to the amounts of their respective claims. They were stockholders and like every other member of a moneyed or trading corporation they took their chances of loss and gain. If the bondholders, who were in fact stockholders, are permitted to thus shield themselves from loss, by assuming that they are now bondholders and not owners, it will work a legal fraud.

Lawrence *vs.* Nelson, 21st New York, page 158.

This court in the case of Sawyer *vs.* Hoag, 17th Wal. 623, in deciding the case, says:

"It is therefore but just, that when the interest of the public "or of strangers dealing with this corporation is to be affected by "any transaction between the stockholders *who own* the corporation "and the corporation itself, such transaction should be subject to a "rigid scrutiny, and if found to be infected with anything unfair "towards such third persons calculated to injure him, or designed "intentionally and inequitably to screen the stockholders from loss "at the expense of the general creditor, it should be disregarded or "annulled so far as it may inequitably affect him."

Whatever once became capital must remain capital.

Holbrook *vs.* Union Bk. of Alax. 7th, Wheat, 553.

If the charter of a corporation sets aside a fund as capital out of which debts are to be paid, it amounts to a contract with those who become creditors on the faith of it, that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock.

Wood *vs.* Dunmer, 2nd Mason, 308.

Curren *vs.* Arkansas, 15th How, 304.

The bonds of complainant under the law, was in fact the capital of the road and complainants claim in equity must be postponed to the payment of all debts of the corporation.

The act authorized "the re-adjustment or *capitalization of the debt and stock thereof.*" That is, it empowered the creditors and stockholders to convert both debts owing by the road and stock then existing into *capital*, and if the bondholders and stockholders did enter into such an agreement and duly accept the terms of the law (which is now admitted) the debts that the road then owed, did under the law become *capital* of the road, and as capital of a corporation both stock and debts owing by the road at the time of capitalization became a trust fund for the payment of the debts of

the corporation and creditors, who have dealt with this corporation since it was so capitalized, have a lien in equity on the whole capital of the road whether it be in the shape of stock or in bonds issued by the road.

Mamme *vs.* The Potomac Co., 8th Pet. 285.
Story's Eq. Jur. Sections 1,252, 1,257.
Goodin *vs.* Whitewater Canal, 18th, O. S. R., 170.

II.

The Mortgage provides, see page 15.

"That the possession of the said railroad should be held by the "said Cincinnati and Zanesville Railroad Company, and said railroad "be operated and carried on by said company so long as no default "was made in the payment of the sums secured to said trustees and "that it should be the duty of said company before declaring and "paying any dividend to its stockholders, *to apply so much of the "earnings of said company or the proceeds of its business as might be "necessary to the fully paying off the current expenses and all balances "in arrear of prosecuting and carrying on its business* and the "necessary expenses of keeping its road and rolling stock in repair."

The said mortgage further contained the following:

"That said company being in the possession of said Railroad, "should have the power to pay the money and income arising from "the business of said railroad *in payment of the expenses, both current "and in arrear of prosecuting and carrying on its said business,* and in "payment of all necessary repairs." See page 15.

Thus we find by the contract in the mortgage, that it was agreed between the parties to the mortgage that the expenses of operating the road were to be paid out of the earnings of the road; or the Mortgagees agreed and put it on record to the world and all persons dealing with the said Railroad Company, that not withstanding the mortgage of complainant it was agreed that the *expenses of operating the road were to be paid by the Railroad Company and that the Mortgagees to that extent waived the lien of their mortgage.* Was the claim of Jeffery Administrator, one of the claims within the provision of expenses incurred in operating the road?

In the case of Cowdry *vs.* the Galveston Railroad Company, 93 U. S. this court, on page 354 says:

"The allowance for goods lost in transportation and for *damages done to property whilst the* road was in the hands of the receiver *was properly made. The earnings received were as much chargeable with*

such loss and damage as they were chargeable with the ordinary expenses of managing the road. The bondholders were only entitled to what remained after charges of this kind as well as the expenses incurred in their behalf were paid."

See Lane *vs.* Boughman, 17th O. S. R.—642. In this case it appear that Boughman, who had recovered a judgment against a Railroad Company for damages in negligently killing stock belonging to him, caused an execution to be levied on wood belonging to the company. Lane who was a trustee under a mortgage of the road, brought his action to enjoin the sale of the wood on the ground that it was included in the mortgage and the mortgaged property was insufficient to pay the mortgage debt.

The court in deciding the case. (See page 648) say:

"But the mortgage in this case contains an express reservation "of so much of the income as might be necessary to pay for the "running expenses, repairs, &c. We do not question that the "liability of the company for which these judgments were rendered "*ought* to be regarded as *included in necessary expenses and to be paid* "*as such*; or perhaps without such reservation, they ought to *be* "*regarded as incidental liabilities incurred by the company in operating* "*the road and to be deducted from the earnings before the net income* "*covered by the mortgage could be properly ascertained.*"

This authority of the Supreme Court of Ohio, places the judgment of Jeffery within the *necessary expenses of operating the road.* If this be so, then the judgment of Jeffery is one of the claims that the complainant *agreed should be paid out of the earnings* of the road or from other receipts of the road. Complainant having agreed and published that this and similar claims should be paid from the funds of the Railroad Company, can he now in a court of equity be permitted to deny or resist its payment?

Complainant is bound by the recitals in his mortgage and will not be permitted to enforce what is favorable to him and deny what is unfavorable. He brings this mortgage in as the document under which he claims and asks a sale of the property, the court has done this for him; and he having asked the enforcement of this document, he must abide by its provisions whether in his favor or against him.

Complainant is bound by the contract made for him in the law authorizing the operation of the road, and it is the same as though it was written in the mortgage itself. See Section 6 of Act printed in Appendix.

Curren *vs.* Arkansas, 15th How, 304.

If a mortgage is made and in it is recited that it shall be subject to a prior mortgage or lien, it will be so decreed by the Court although the prior mortgage or lien may be defective.

Coe *vs.* C., P. & I. R. R. Co., 10 O. S. R., 372.

We claim that the law of the reorganization or charter of the Cincinnati and Zanesville Railroad Company, accepted by complainant does for Jeffery what this Court said of the resolution of the Pa. legislature in the case of Fox *vs.* Seals 22nd Wal. 425.

"It was at least intended that the property into whose ever "hands it might come, should remain subject to a *paramount* claim "of the contractors so long as the debt due to him remained unpaid, "that this was substantially giving to him a lien of indefinite "duration, seems quite plain it was not a *jus in re nor a jus ad rem; "but it was a charge upon the property a right to prevent any "disposition of it, by which it could be withdrawn from the "creditors reach and therefore in a very legitimate and equitable "lien.*"

"It more properly constitutes a charge on the property."

Story's Eq. Jur., Sec. 1215.

Again, complainant having agreed in the mortgage that the Cincinnati and Zanesville Railroad Company, should pay the expenses of operating the road out of the fund, the contract was similar to a contract that the purchaser or tenant should pay the purchase money or rent, in discharge of incumbrances on the premises sold in equity. This made the Cincinnati and Zanesville Railroad Company a trustee for complainant and the *cestuy que trust.* Story's Eq., Sec. 1231.

The *trust* in equity having once fairly existed in favor of Jeffery, complainant, can not extinguish it without the consent of Jeffery or by the decree of a court to which Jeffery was a party. Complainant further agreed in accepting the reorganization of the road, that the lien of his mortgage should be postponed to the lien of the Jeffery judgment. It must be borne in mind, that complainant was the original contracting party in the above contract and has no equities in his favor.

In Story's Eq. Jur., Sec. 1231; that author, says:

"Indeed there is generally no difficulty in equity in establishing "a lien, not only on real estate but on personal property; or on "money in the hands of a third person, wherever that is a matter of "agreement at least against the party himself and third persons who "are volunteers or have notice. For it is a general principle in

"equity, that as against the party himself and any claiming under "him voluntarily or with notice, such an agreement is a trust."

On this authority we claim the fund now in court is a trust fund, that Jeffery has the best right to and a paramount lien to complainant.

Where a lien or equitable claim constituting a charge in rem is a matter of agreement, it will be enforced in equity.

Fletcher *vs.* Morey, 2nd Story R, 555. Mitchel *vs.* Winslow, Ib, 625. See also, Coe *vs.* C. P. & I. R. R Co., 10th, O. S. R , 372.

III.

It may be for this Court now to construe this Statute of Ohio for the reorganization of railroad companies, it never having been before the Supreme Court of Ohio and so far as the published reports go, nothing has been done by the Courts of that State, to explain this act. We will now endeavor to explain what we think the legislature intended by this statute:

FIRST—The title of the Act was given by the Legislature as follows: *An Act, to regulate the sale of Railroads, and the reorganization of the same,*

SECOND—The first Section begins, "That in case two-thirds in interest of the creditors of a Railroad Company and two-thirds in interest of the stockholders of such Company, shall agree in writing, upon a plan for the *re adjustment or capitalization of the debt, and stock thereof,* then upon judicial proceedings for the sale of the Road under a mortgage * * . * * *

The Fourth Section provides that the title to the property and franchise shall vest in the trustee and in the new company.

The Fifth Section gives authority to mortgage the road.

The Sixth Section is as follows:

"The lien of the mortgages and deeds of trust authorized to be made by this Act, shall be postponed to the lien of judgments recovered against said corporation after the reorganization, for any labor *thereafter* performed for it, or for materials or supplies *thereafter* furnished to it, or *for damages, for losses or injuries thereafter suffered by the misconduct of its agents,* or in any action founded on its contracts or liability as a common carrier, thereafter made or incurred.

It is apparent that the law was intended by the legislature to aid insolvent corporations. The road was to be sold by decree of Court, upon a mortgage; the creditors and stockholders were to

agree upon a basis of capitalization, and then, the road might be again mortgaged to secure the *same debts*. Having got this far along with the Act, it was clear to the legislature, the new corporation assuming such part of the debts of the old corporation as was agreed upon, that they were then enfranchising an insolvent and irresponsible corporation, such a corporation as judgments could be obtained against, but by reason of the mortgages authorized by the Act, no money could be made out of. This being apparent to the legislature, they then in order to protect persons dealing with this bankrupt and irresponsible corporation, incorporated Section 6, as a part of this Act.

Let us now examine this statute by the rules for interpreting statutes: The old law—the mischief—and the remedy. From what has been already shown it is apparent that the reorganized corporation would by reason of the mortgages be wholly irresponsible, as the old law was. The mischief was, the introduction by the legislature of an insolvent corporation in a public character to the people. The remedy was, to say to the persons dealing with the corporation, although it may be insolvent, yet we say to you, that the Courts are open to you, to sue this insolvent corporation and obtain a judgment against it for any of the causes herein named and the judgment so obtained shall be paid before any claims secured on the said road by mortgages.

"It is the business of the judge so to construe the Act as to "suppress the mischief and advance the remedy."

Galveston R. R. *vs.* Cowdry, 11th Wal. R. 475.

Adms. of Tracy *vs.* Card, 2nd O. S. R., 442.

"The words of a remedial statute are to be construed largely "and beneficially to advance the remedy and suppress the mischief."

Ib. 11, Wal. 475.

"In giving construction to any statute, the Court must con- "sider its policy and give it such an interpretation as may appear "best calculated to advance its object by effectuating the design of "the legislature." Wilber *vs* Paine, 1st O. R., 255.

This was the rule adopted by this Court in the case of Fox *vs.* Seals, 22nd Wal., 424.

The legislature was, in passing this law, making a contract between this new and insolvent corporation and persons who in future might deal with it. The object of the legislature was to permit the corporation to operate its road and yet to make it respond to the persons dealing with it, as though it was solvent. In doing

this it was necessary for it to make a fair provision for both parties. The legislature therefore said substantially: These claims when reduced to judgments, shall be prior to the mortgages. But in order to make them a prior lien they must be established by a judgment. It said to persons dealing with the company, we do not provide any remedy for you to obtain judgment, your right to obtain judgment against this corporation, is just the same as against any other railroad company. We remove and postpone the mortgages on the road and thereby aid you in execution or realizing on judgments against the road. This, in fact, would place this reorganized railroad on precisely the same responsibility as other roads that were solvent; and this was no doubt what was intended by the legislature.

We think this court will readily come to the same conclusion in this case that it did in the case of Fox *vs.* Seals, *supra* and declare the language of the statute is too clear to admit of a question that the legislature by this Act, intended to give to an unpaid judgment creditor obtaining judgments for any of the causes of action stated in the Act, priority of claim to the companies property over every right that belonged to the Mortgagees on mortgages authorized by the said Act. And also to declare that it was intended by the legislature that the property into whosoever hands it might come by any act of the Mortgagees, should remain subject to a paramount lien of judgment of any creditor obtaining judgment for claims set forth in the act so long as the judgment remained unpaid. And that this was substantially giving to such judgments when obtained for the causes stated in the act a lien of *indefinite duration* as against complainant.

The creditor was by the act vested with the right, by proceeding to judgment, to a lien on all the railroad property mortgaged, *paramount* to the mortgage lien of complainant; and to prevent its being withdrawn from such judgment creditors reach, by any acts, or proceeding of the Mortgagees under the mortgage liens that by the act authorizing them to be made, such mortgages are declared junior liens to the said judgments. And the same are therefore in a very legitimate sense legal and equitable paramount liens on the original property of the Railroad Company, or the proceeds of sale thereof. Neither the Mortgagees nor the complainant for them could in any way or by any act deprive the judgment creditor of his paramount lien on the property, without his act or concurrence.

IV.

Jeffery by filing his cross-bill in this action and making averments, so as to give it the nature of a *creditor's bill* on his judgment, obtained a *lien* in equity on the fund in court, and the *statute gives this lien priority. Equitas sequitur legem.*

Mier *vs.* Z. & M. Turnpike Co., 13 O. M. 197.

" See record page 41, marginal page 86, last paragraph.

V.

Having stated the various grounds on which the rights of Jeffery is predicated to participate in this distribution and have his judgment paid out of the proceeds of sale, we will now attend to the claims of complainant. And before doing this we must repeat some of the facts. At the time complainant filed his bill, in the case below, the action of Jeffery was pending, and he claimed judgment against the Cincinnati and Zanesville Railroad Company for $5,000; and by the law, if he did obtain judgment, the lien of his judgment, would be paramount to the lien of Complainant's Mortgage, on all the property of the Cincinnati and Zanesville Railroad Company. Complainant then filed his bill against the Cincinnati and Zanesville Railroad Company, obtained an order for, and did sell, all the property of the said Railroad Company, before Jeffery obtained his judgment against the railroad company. Afterwards, Jeffery obtained his judgment and while sufficient of the proceeds of sale remained in the court undisposed of to pay said judgment, Jeffery filed his cross-bill herein.

The question now is. Would the sale of the property in a case to which Jeffery was not a party, in any way affect his rights?

We deny that the rights of *any but parties to the action are affected by any judgments, decrees, sales* or any other acts or proceedings by a Court. Jeffery became a party to the action below, on his own motion, after the sale. The acts and decrees of the Court prior to his becoming a party to the action, could not affect his rights to the subject matter. He was a new party, and it was necessary for the Court to begin the case as to him, *de novo*, and to give to him all the rights and equities in the subject matter or its substitute, that he had at the date of filing Complainant's bill, or that he had acquired after Complainants suit was brought, or at any time until final distribution of the proceeds of sale.

Hook *vs.* Paine, 14th Wal., 252.

Ogilvie *vs.* Knox Ins. Co., 2nd Black, 539.

Coiron *vs.* Millandon, 2nd Black, 113.
Wolf *vs.* Lewis, 2nd Black, 280.
Bebe *vs.* Russell, 2nd Black, 283.
Craighead *vs.* Wilson, 18th How., 199.

Jeffery, by law, when he had obtained his judgment, obtained a lien paramount to the lien of the mortgage of Complainant, and he could have either a re-sale of the mortgaged premises, or he could apply to the Court having the proceeds of sale, to have his claim paid out of the proceeds of sale. The latter is the practice in Ohio.

Meyers, et al *vs.* Hewit, 16th O. R. 449.
Olcut *vs.* Bynum, 17th Wal. 63.
Porter *vs.* Barclay, 18 O. S. R. 546.

In Porter *vs.* Barclay, the Supreme Court of Ohio held "that "where two parties each hold a lien on the same premises and each "of them seeks the enforcement of his lien by a distinct and indepen- "dent proceeding; and the party holding the inferior lien, first "obtains a sale of the premises, *the proceeds of which sale are in* "*the hands of the Court. It is good practice and in accordance* "*with the policy of the law, to permit the party holding the superior* "*and preferable lien, to come in and be made a party to the pro-* "*ceeding of the one holding the inferior lien*, and to order a distri- "bution of the proceeds of the sale in accordance with the *rights* "*and priorities* of the parties respectively." But to return to the effect of the sale on the rights of Jeffery. This Court has had occasion to examine this before.

In the case of Galveston R. R. *vs.* Cowdry, 11 Wal. 475, there had been a sale of the road on execution, under a statute of Texas, authorizing a sale, and the mortgagees were not parties to it, and it was claimed in that case, that the sale on execution extinguished the lien of prior mortgage because the statute authorizing the sale was passed after the mortgages were made. This Court in deciding the case says:

"It can not be claimed as is done by the defendants, that a sale under one mortgage or judgment by virtue of this law, nullifies and destroys all prior mortgages; such a doctrine would work the greatest injustice and would open the door to the grossest frauds. *A sale under a junior security must be subordinate to one that is prior and paramount.* Successive sales of the same franchise can no more be incompatible than successive sales of the same property, and we all know that a sale of land under a judgment, does not in

the slightest manner affect a prior mortgage. A subsequent sale of the same land may be made by virtue of the latter."

Courts of equity have always been in the practice of doing exact justice. In such cases they could ever, and always did, adopt the practice of dealing with either the property itself, or the proceeds thereof. It always adapts its relief to the facts at the time the relief is granted. If the thing had been disposed of, then the Court if justice can be done to the parties thereby, will substitute the proceeds of sale for the thing sold by placing the parties claiming, in the same position as to the proceeds of sale at the disposal of the court as they sustained to the thing sold before the sale. "And there are no grounds upon which equity can disregard the priority of legal or equitable liens. The priorities which characterize the several liens at law, must attach to the equities which arise from those liens."

*In the case of Markey *vs.* Langley, 92nd U. S., 142; on page 155 this court says:

"The lien of the mortgage and the mechanics lien attaches to "the proceeds of the sale in the same manner and in the same order "and with the same effect, as they bound the premises before the "sales were made."

Again, this court in the case of Olcott *vs.* Bynum, 17th Wal. 63, uses this language in deciding the case.

"The lien of the mortgage continued upon the fund as it "subsisted upon the premises before they were sold. If a court of "chancery had administered the fund, it would have so applied it. Such is the settled rule in equity."

The rule is the same in Ohio.

Moore *vs.* Rittenhouse, 15th O. S. R., 318.

In Ohio there is a statute, declaring that a judgment shall be a lien on the real estate of the judgment debtor in the county, where the judgment is obtained from the first day of the term at which the judgment was rendered.

L obtained judgment against M. M was at the time the legal owner of lands in the county where the judgment was obtained. M had contracted to sell the land to D before the judgment of L was obtained, and a part of the purchase money had been paid M and there remained $850 of the purchase money unpaid at the time the judgment was rendered. L caused execution to be issued on the judgment and levied on the land. After the judgment was obtained. M conveyed the land to D the purchaser and D with

knowledge of the judgment of L paid M. the $850, residue of purchase money. D then filed a bill against the judgment creditor and the judgment debtor, the vendor, to set aside the levy and quiet her title in the premises so conveyed to her. The Supreme Court of the State, decided that L by his judgment obtained a lien on the land to the extent of the purchase money unpaid at the time the judgment lien attached to the land and that the purchaser having paid that part of the purchase money to the vendor, with a full knowledge of the judgment lien must repay the purchase money to the extent it was unpaid at the date of lien of the judgment; or in this case the court subrogated the judgment creditor—to the judgment debtor, the vendor, to the extent of the unpaid purchase money at the date of the judgment, and this was done on the authority and force of the judgment lien only.

Lefferson *vs.* Dallas, 20th O. S. R., 63.

If a court then will decree a *repayment* in case of the sort above stated, need we say more of what a court should do in a case where it has the proceeds of sale at its disposal, and the original parties to the transaction before it?

The case last cited show that judgment liens are highly favored and rigidly enforced in Ohio.

The claim of Jeffery was prior to his obtaining judgment thereon, an inchoate right or equitable lien, on all the property of the Railroad Company.

At the time Zentmeier was killed by the negligence of an employee of the said Railroad Company, there vested in his representatives a right of action against the railroad company, for the damage so sustained. And by the law authorizing the said road to be operated and under which Complainant's mortgage was made, it was declared that when said representative should obtain a judgment against said Railroad Company, (if he should obtain a judgment for said cause) *the mortgage of Complainant should be postponed to the lien of said judgment.* The representative of Zentmeier, was then and thereby, vested with an inchoate lien, and by proceeding with his action and obtaining his judgment, the lien of Complainant's mortgage was postponed to the lien of said judgment, while his suit was pending and before his inchoate lien became an absolute lien, the road his judgment was to be a lien on, was sold, and sufficient of the proceeds remained in the hands of the Court to pay the said judgment

The sale was made at the instance of Complainant by order of

a Court, in an action, to which the representative of Zentmeier was not a party. At this period of the proceeding below, the inchoate lien of the representative of Zentmeier, became absolute by his obtaining his judgment, and the right thereby, absolutely to enforce the lien of his said judgment by postponing the lien of Complainant's mortgage to the lien of said judgment, under such a state of facts. Is he to be informed that a junior mortgagee has procured a sale of the property on his mortgage before the lien of Jeffery's judgment attached to the property, and that therefore his lien is lost?

There are two difficulties in this; one, that Complainant could do no act that would displace the lien of Jeffery; the other, that the lien of the representative of Jeffery could not be affected in any Court in which he was not a party.

The case of the representative of Zentmeier is quite similar to the case of the State Bank of Ohio against Hinton, 21st O. S. R. 509. The action was for the foreclosure of mortgage and sale of mortgaged premises. The mortgage was made in 1845 by Hinton and wife, two (2) years after Hinton alone, his wife not joining in the deed, conveyed the equity of redemption which had come to Collins Powers & W. In 1860 the property was sold by order of the Court for $10,700 and sale confirmed and $2,257.40 paid out of the proceeds of sale to costs and mortgage debt of Plaintiff; paying the mortgage debt in full, and $2,110.60 was paid to Collins and others on account of their interest in the equity of redemption, and $4,221.20 was retained in Court to await the further order thereof. In 1865, five years after the sale was made and confirmed, Hinton died, and Mrs. Hinton, his widow, filed her answer and cross-petition asking to be endowed of the proceed remaining after the payment of the mortgage. The Court in deciding the case, page 516, says:

"The proceeding in the case before us had not been terminated by a final distribution, when the inchoate right of Mrs. Hinton became absolute by the death of her husband. A moiety of the surplus is subject to the Chancellor's control. The proceeding is one of purely equitable cognizance her rights springing into full vitality and absoluteness while the subject matter of it remained so subject, attaches to and must be enforced against it as a paramount equity, which in the forum of conscience cannot be ignored or repelled."

"That, Mrs. Hinton, would have been dowable if her right had become absolute after decree and before the sale is not seriously controverted. But no sound reason exists for giving to the fact of sale, an effect which could not result from the fact of decree before

sale. Her equity is as strong at one time as at the other. The subject matter of the equity is as completely within the power of the Chancellor, after sale as before. The rights of others cannot suffer greater prejudice by respecting it in the one contingency than in the other."

THOMAS L. YOUNG,
S. T. CRAWFORD and
RANSFORD SMITH,
Counsel for Appellant

APPENDIX FOR BRIEF OF APPELLANT.

Copy of the law regulating reorganization of railroads and under which the Cincinnati, Wilmington & Zanesville Railroad was reorganized, passed by the Ohio Legislature, April 11th, 1861. Vol. 58, Ohio Laws, page 70.

"An Act to regulate the sale of railroads and the re-organization of the same."

SECTION 1.—Be it enacted, etc., that in case two-thirds in interest of the creditors of a railroad company and two-thirds in interest of the stockholders of such company, shall agree in writing, upon a plan for the re-adjustment or capitalization of the debt and stock thereof, then upon judicial proceedings for the sale of the road, under a mortgage or mortgages or a deed or deeds of trust, the Court before which such proceedings may be had, shall proceed to render a judgment or decree against the company for the amount that may then be due and in arrear upon said securities, which judgment or decree shall, from its rendition, become a lien on all the property embraced in such securities and upon all the franchises and powers of said company, including its franchise to be and act as a corporation conferred by the charter and the amendments to the charter of such company, and upon a sale had under such decree and a purchase at such a sale by trustees, on behalf of the parties to such agreement, appointed by said agreement, all the said property so bound by the judgment or decree, including all the said franchises, shall vest in said trustees; provided that every such agreement shall provide that the unsecured debts of the company incurred for repairs or running expenses, shall be paid in money or bonds of the re-organized company, as herein after provided; said

bonds to be of the highest class issued; a copy of the terms of said agreement shall be filed in said Court before the rendition of said decree.

SECTION 2.—That the said trustees shall, as soon as may be, after the sale, call a meeting of the parties to the aforesaid agreement, by a notice signed by a majority of said trustees, or of their survivors, and published not less than once a week, for four weeks, in a newspaper printed in the cities of New York and Philadelphia, and in another newspaper printed in each county on the line of said railroad, specifying the day and place and object of such meeting; the place of such meeting to be on the line of such railroad; that at such meeting, each of the parties to the aforesaid agreement, shall be entitled to vote according to the provisions thereof, but not exceeding one vote for every fifty dollars of the par value of the debt or stock of such party, according to a list of voters and of their respective interests, which shall be prepared by the said majority of the trustees, who are empowered to act as judges of the election; that such meeting by a majority in interest of the persons present, in person or by proxy, shall be competent to retain or change the name of said corporation, to decide, for the time being, the amount of its capital and the number of shares into which such capital shall be divided, to fix the number of directors and their term of office, to elect such directors, a majority of whom shall be residents of the State or States in which such railroad is situated, and to do all things necessary or proper to reorganize said corporation; provided that any creditor shall be entitled to become a party to the agreement aforesaid, either at, or any time before the meeting, in this Section provided for, and any stockholder shall be entitled to become a party to the agreement aforesaid at any time within one year after such meeting.

SECTION 3.—That a certificate, under the common seal of such corporation, specifying its name and the railroad which it is to hold, maintain and operate, shall be filed in the office of the Secretary of State, and that a copy of such certificate, duly authenticated by him, under the great seal

of this State, shall in all Courts and places, be evidence of a compliance with all the conditions and provisions of this Act, and of the due reorganization and of the existence of the said corporation.

SECTION 4.—Upon such reorganization, and a conveyance by the trustees, or of such of them as shall be vested with the legal title, or their survivors, all the railroad and other property and franchises and things purchased as aforesaid, and all the franchises, powers, faculties, privileges and immunities which were possessed or enjoyed by the original company, or by any company with which it had been consolidated, shall pass to and be vested in the said corporation as reorganized; and the same, and all property and things which the said reorganized corporation shall thereafter acquire, except as hereinafter provided, shall be taken, held and disposed of, for the use and benefit of the creditors and stockholders of the said corporation, who shall have become such, upon and after such reorganization, according to their respective rights, but subject to the powers of the said corporation, and shall be in no wise chargeable in respect to any debt, liability, or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for; but all property of the original corporation not embraced in the said sale, shall, upon the reorganization, be vested in the said corporation as reorganized, in trust for all parties interested therein as creditors, stockholders, or otherwise.

SECTION 5.—That said corporation shall likewise have power, at any time within six months after the reorganization, to assume such debts or liabilities of the original company, and to make such adjustments or exchanges with any bondholders of the original company, and any stockholder within one year, as to the said corporation may seem expedient, and may use for such purpose any bonds or stock which it may be authorized to issue or create; and it shall have power to make and issue said bonds, payable at such times and places, and bearing such rates of interest as it may deem expedient, not exceeding seven per cent. per

annum, and to secure the payment of any bonds which it may issue or assume to pay, by mortgages or deeds of trust of its railroad, or any other of its property, real or personal, and to include therein with its road all its cars and other rolling stock and equipments and any machinery, tools, implements, fuel, materials and all other things then held or thereafter to be acquired, for the constructing, operation or repairing said road, or for repairing or replacing any of its equipments or appurtenances, as part and parcel of said railroad, and as constituting with said road one property, and to include in such mortgages and deeds of trust, all franchises held by said corporation, and connected with or relating to said road, and all other corporate franchises of said company: all which said franchises, including the franchise of being a corporation, in case of sale by virtue of any such mortgage or deed of trust, or of any judgment specified in section six, are hereby declared to pass to the purchasers, so as to enable them to reorganize the corporation in the manner herein provided, and shall also have power to issue capital stock to such aggregate amount as it may deem proper, not exceeding any limit which may be fixed by agreement with the trustees purchasing as aforesaid, and may establish preferences in respect to dividends, in favor of one or more classes of the said stock, in such order and manner as it may deem expedient, not exceeding such limit as may be fixed by agreement as aforesaid, and may, if authorized by the agreement mentioned in Section one, confer on holders of any bonds which it may issue or assume to pay, such rights to vote at all meetings of stockholders, not exceeding one vote for every fifty dollars of the par amount of the said bonds, as may have been provided for in the agreement mentioned in Section one, which rights, when once fixed, shall attach to and pass with such bonds; under such regulations as the by-laws may prescribe to the successive holders thereof, but shall not subject any holder to any assessment by the said company, or to any liability for its debts, or entitle any holder to dividends.

SECTION 6.—The lien of the mortgages and deeds of

trust authorized to be made by this Act, shall be postponed to the lien of judgments recovered against said corporation after its reorganization, for labor thereafter performed for it, or for materials, or supplies thereafter furnished to it, or for damages, for losses, or injuries thereafter suffered or sustained by the misconduct of its agents or in any action founded on its contracts or liability as a common carrier, thereafter made or incurred.

SECTION 7.—Provides that this Act may apply to roads part in and part out of the State, not necessary for the construction.

SECTION 8.—Provides that appraisement may be waived and not important or necessary to construction.

SECTION 9.—Provides for State, county and township stock.

SECTION 10.—Provides that roads that have been sold may be reorganized under this law.

Spencer & Craig Pr. Wks., 169 & 171 Race St., Cin'ti

No. 271.

IN THE

Supreme Court of the U. S.

F. JEFFERY, Administrator of Zentmeier,
Appellant.

vs.

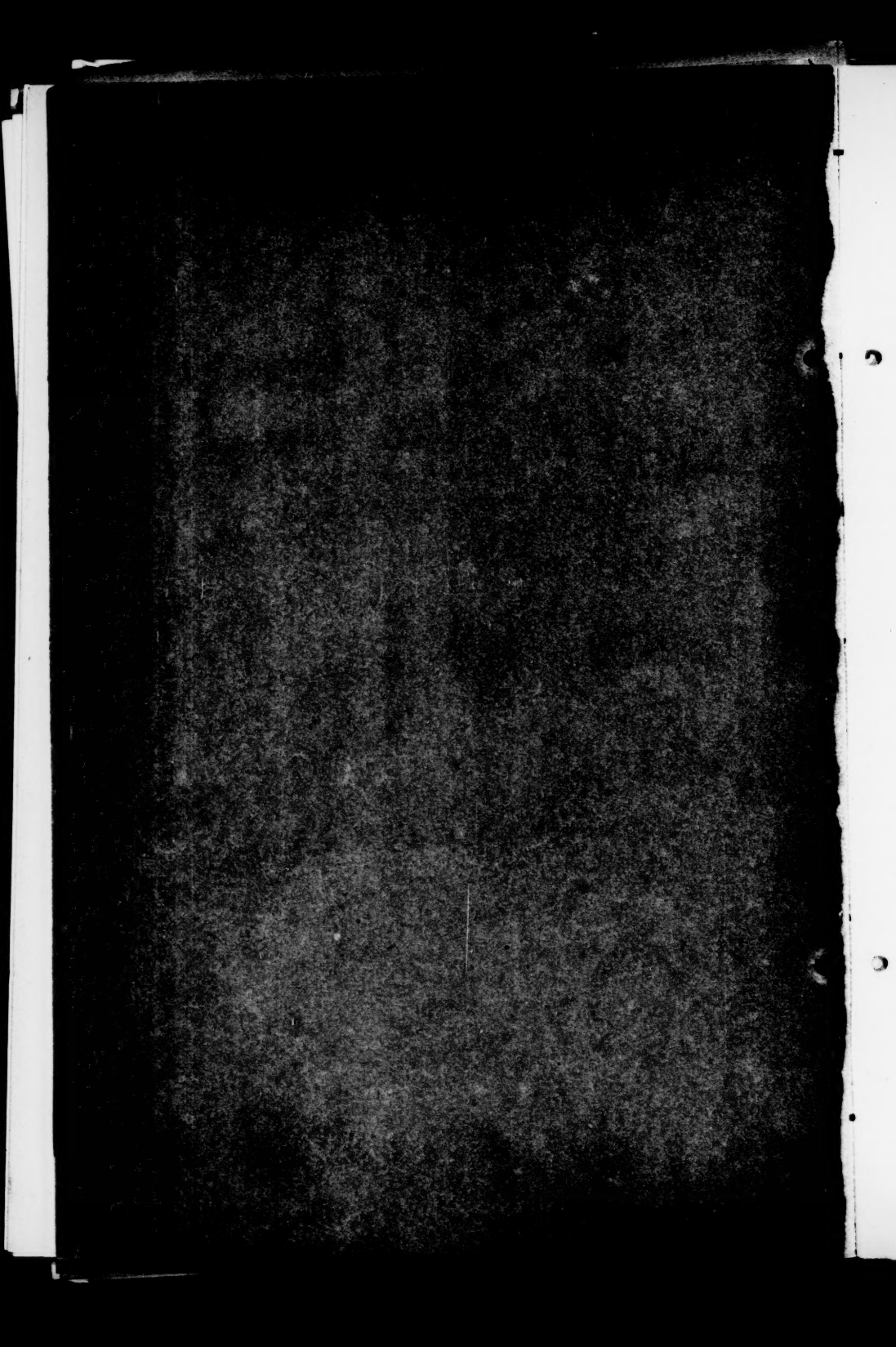
CHARLES MORAN, Trustee, and others,
Appellees.

IN CHANCERY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF ON BEHALF OF APPELLANT,

By S. T. CRAWFORD,
Of Counsel.



IN THE SUPREME COURT

OF THE UNITED STATES.

Francis Jeffery as Administrator of the estate of William L. Zentmeier, deceased, Appellant,

vs.

Charles Moran, Trustee, Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

Francis Jeffery as administrator of the estate of Wm. L. Zentmeier, deceased was on his own motion made a party Defendant in the cause of Charles Moran, trustee, *vs.* the Cincinnati and Zanesville Railroad Company, *et al* in the U. S. Circuit Court for the Southern District of Ohio. (See 38 page of record.) He then filed his cross-bill therein to which Charles Moran, trustee, filed a general demurrer. (See 56 page of record.)

The demurrer was sustained, the cross-bill dismissed, and Jeffery appealed. Record page 57.

The facts set forth in the cross bill are substantially as follows: See pages 38, 39, 40, 41 and 42.

That there was in Ohio the Cincinnati *Wilmington* and Zanesville Railroad Company, which at one time owned and operated a railroad from the city of Zanesville to the town of Morrow.

That said company became insolvent, and its road and franchises were sold under proceedings in said Circuit Court to Charles Moran, trustee for the creditors and stockholders of said company, on June 3rd, 1863.

That said Railroad Company after the sale of its road was *reorganized* under the name of the Cincinnati and Zanesville Railroad Company, on March 11th, 1864, under a statute of Ohio relating to the sale and reorganization of insolvent railroad companies, passed April 11th, 1861. (See statute in appendix hereto); that on March 12th, 1864, Charles Moran who had purchased said road as a trustee, conveyed the same to the reorganized company, namely, the Cincinnati and Zanesville Railroad Company, one of the respondents below and received from said company the mortgage to him as trustee, for the foreclosure of which this action was brought below. (See exhibits one and two of the cross-bill); that said railroad was operated by the reorganized company from the date of said deed until the road was placed in the hands of a receiver by the court below in this case.

The said mortgage contained the following clauses: Page 15.

"That the possession of the said railroad should be held by the said Cincinnati and Zanesville Railroad Company, and said railroad be operated and carried on by said company so long as no default was made in the payment of the sums secured to said trustees, and that it should be the duty of said company before declaring and paying any dividend to its stockholders to apply so much of the earnings of said company or the proceeds of its business as might be necessary to fully paying the current expenses and all balances in arrear of prosecuting and carrying on its business and the necessary expenses of keeping its road and rolling stock in repairs." (See item first of the mortgage,) page 15 of record.

And that it was further set forth in said mortgage. See page 15 of record.

"That the said company being in the possession of said railroad should *have the power to pay the money and income arising from the business of said railroad in payment of the expenses both current and in arrear of prosecuting and carrying on the said business and in* payment of all necessary repair and that *the directors of said company in prosecuting said business and applying funds as aforesaid for all the purposes of said mortgage, shall be deemed to be acting in trust for the use of the grantees of said mortgage and all persons beneficially interested in the security intended to be effected by this mortgage*, and that any breach of trust should be a breach of the condition upon which said company is to retain the possession of said railroad." (See item second) on page 15.

And it was further provided in said mortgage. See page 18.

"That the grantees thereof in executing their *trust* and powers granted in said mortgage, should not be held *personally liable for any loss, accident or injury that should happen to any person, but that the same so far as legally chargeable against them, should be deemed a part of the expenses, incident to the execution of said trust and powers, and be paid or refunded out of the trust property or the proceeds thereof, and that said grantees should have the right to retain therefor accordingly.*" (Item third, last clause.)

The cross-bill further shows: Page 41.

That on the 22nd day of June, 1866, Wm. L. Zentmeier was killed by negligence of employes of the Cincinnati and Zanesville Railroad Company, in operating the road. That on the 16th day of July, 1867, an action was brought by his administrator against the Cincinnati and Zanesville Railroad Company, for damages for causing the death of Zentmeier, in the Court of Common Pleas of Clinton County, Ohio; that Defendant, the Cincinnati and Zanesville Railroad Company, in that action was served and filed its answer and the action remained pending on the 30th day of April, 1869, when complainant below filed his bill in this cause for the foreclose of his mortgage and the sale of the mortgaged premises.

That on October 16th, 1869, the Court below decreed the foreclosure and sale of the mortgaged premises. And the road was on December 2nd, 1869, sold to Thos. L. Jewet, for the sum of $1,004,000.00 and the sale was confirmed by the Court and the proceeds of sale ordered to be paid to the costs of the action and to the bondholders under the said mortgage, except the sum of $7,082.26 which yet remains at the disposal of the Court in the hands of the Special Master, who made the sale. That the proceeds of sale were insufficient to pay complainants mortgage in full.

That the action of Jeffery, Administrator against the Cincinnati and Zanesville Railroad Company, in the Clinton County Common Pleas Court, was actively prosecuted until February 28th, 1871, when the said Administrator, the Appellant here duly obtained a judgment for $5,000.00 and costs against the Cincinnati and Zanesville Railroad Company, which judgment remains in full force and wholly unpaid.

That there is no property of the said Railroad Company out of which any part of said judgment can be made, except the said sum of $7,082.26 in the hands of said Special Master.

Appellant claimed in his said cross-bill that his judgment was a lien on the proceeds of sale paramount to the lien of Complainant's

mortgage, and asked the Court to appropriate out of the proceeds of sale yet remaining at the disposal of the Court, sufficient for the payment of said judgment.

The dates of these transactions are as follows:

1861, April 11th, law authorizing reorganization passed. March 11th, 1864, reorganization effected. March 12th, 1864, the railroad deed from Moran to the Cincinnati and Zanesville Railroad Company and mortgage from Cincinnati and Zanesville Railroad Company to Moran, trustee. In the year 1866, June 22nd, Zentmeier killed by the negligence of the employees of the Company. 1867, July 16th, Zentmeier brought suit in Clinton Common Pleas. 1869, April 30th, complainant Moran's bill filed to foreclose his mortgage. 1869, October 16th, railroad sold to Jewet. 1871, February 28th, Zentmeier's Administrators recovered judgment. 1875, November 5th, Jeffery, Administrator of Zentmeier made party and filed his answer and cross-petition to enforce lien, and in the nature of a creditors bill.

ARGUMENT.

The Appellant Jeffery, Administrator of Zentmeier, deceased, claimed below, and now claims that he is entitled to have his judgment paid out of the proceeds of the sale of the said railroad on three different grounds. FIRST—Because in *fact* the complainant Moran and those he represents as Mortgagees and Bondholders were at the time of the injury to Zentmeier, the *actual owners* of the said railroad and were in fact actually *operating* the same and were actually liable to Zentmeier for the acts of the said Railroad Company, their trustee.

SECOND—Because in the mortgage under which complainant below claims that he is entitled to the proceeds of sale, it was stipulated and agreed that the claim of Jeffery or *all claims for expenses in operating the road* should be paid out of the proceeds, and complainant agreed to and did wave the lien of his mortgage to the payment of the expenses of operating the road.

THIRD—Because the law under which the said railroad was reorganized and operated, provided that the lien of Complainant's mortgage should be postponed to the liens of judgments obtained against the Railroad Company for injuries suffered by negligence of any employee of the said railroad (see appendix). Of these, in their order:

I.

The first section of the act under which the law was reorganized, reads as follows: "That in case two-thirds in interest of the "Creditors of a Railroad Company, and two thirds of the Stock- "holders of such Company shall agree in writing upon a plain for "the re-adjustment or *capitalization of the debts and stock thereof.*"

All the power granted here is, that the *then* Creditors and Stockholders of the Road, to mingle and place the debts then owing by the Road, and the stock of the Road, into a common fund as stock or *capital* of the Road.

Also that in the mortgage of Complainant it was provided that the directors of the said Railroad Company in prosecuting said business and applying funds as aforesaid, for all the purposes of said mortgage *shall be deemed to be acting in trust for the use of the grantees of said mortgage* and all persons beneficially interested in the security intended to be effected by said mortgage.

In the habendum clause of the deed, we find the following:

"Subject, nevertheless to be held, used, operated, carried on, "owned, mortgaged, pledged and sold or otherwise disposed of *to* "*and for the use of the beneficiaries* interested therein, under the "purchase thereof by the said Charles Moran, herein recited and "set forth in conformity with his report and declaration of trust "herein referred to." See page 44 of record.

The Cincinnati, Wilmington & Zanesville R. R. Co. at the time of the reorganization thereof, was a corporation that had become insolvent. Its capital had not only been consumed; but all the property belonging to it, could not be sold for enough to pay its debts. It was necessary, in order to continue the business of the corporation, that the creditors of the corporation should arrange the debts due them from it, as its capital, it could obtain no other capital. The Statute provided for this to be done, and this was the effect and result of the reorganization.

It is true, Complainant took bonds as a *substitute for the original bonds*, (see mortgage 12, printed at close of page 24, written of Record, also, page 13 endorsement on the bonds) and as between Complainant and the original stockholders of the corporation, he, may have remained a bondholder; but as to third persons dealing with the corporation, he was a stockholder.

Ochiltree *vs.* Railroad Co., 21st Wal., 249.

The form the parties have used does not fix the character of the transaction.

Corcoran & R. *vs.* Powers, et al. 6th O. S. R., 37.

The property of a corporation is a trust fund for the benefit of Creditors and *Stockholders.*

Mamma *vs.* Potomack Co., 8th Pet., 285.

Sawyer *vs.* Hoage, 17th Wal., 610.

Goodin *vs.* Whitewater Canal, 18th O. S. R., 169.

Complainant and those he represents, were Stockholders; or at least were the owners of the corporation and should in fact be considered as Stockholders.

Lawrence *vs.* Nelson, 21st N. Y. R, 158.

Sawyer *vs.* Hoag, 17th Wal., 623.

Whatever became capital, must remain capital until all debts of the corporation are paid.

Holbrook *vs.* Union Bk. of Alax. 7th, Wheat, 553.

Curren *vs.* Arkansas, 15th How. 304.

If the charter of a corporation sets aside a fund as capital out of which debts are to be paid, it amounts to a contract with those who become Creditors on the faith of it, and the fund shall not be withdrawn until all its debts are paid.

Curren *vs.* Arkansas, 15th How. 304.

Wood *vs.* Dunmer, 2nd Mason, R. 308.

The Bighampton Bridge, 3th Wal., 51.

II.

The claim of Jeffery's were such expenses as was agreed should be paid, the mortgage contains the following: See page 15-30.
"that it should be the duty of said Company before declaring and "paying any dividend to its stockholders, *to apply so much of the "earnings of said Company or the proceeds of its business as might be "necessary to the fully paying off the current expenses and all balances "in arrear of prosecuting and carrying on its business* and the "necessary expenses of keeping its road and rolling stock in repair."

The said mortgage further contained the following:

"That said company being in the possession of said Railroad, "should have the power to pay the money and income arising from "the business of said railroad *in payment of the expenses, both current "and in arrear of prosecuting and carrying on its said business,* and in "payment of all necessary repairs." See page 15.

This is a contract, that expenses of operating the Road, shall be paid out of the earnings. Such claims as Jeffery's is, has been

determined to belong to and *be a part of the expenses of operating the Road.*

Cowdry *vs.* Galveston R. R., 93 U. S. 354.

Lane *vs.* Boughman, 17th O. S. R., 642.

If the injury had happened while the Road was operated by a receiver, then the Road would be liable and the receiver would be ordered to pay it.

Cowdry *vs.* Galveston R. R., 93 U. S. 354.

Mera Adm's *vs.* Holbrook, 20th O. S. R., 137.

If the receiver would be liable, could Complainant be exempted?

Complainants mortgage contained an express provision that the expenses of operating the Road were to be paid; and to the extent of the expenses of operating the road the *lien* of Complainant's mortgage was *waived.*

Bronson *vs.* La Crosse R. R., 2nd Wal., 283.

Coe *vs.* C. P. & J. R. R., 10 O. S. R., 372.

The Cincinnati & Zanesville R. R. Co. having contracted with Complainant, that it should pay the expenses of operating the Road, out of the earnings of the road, it became a trustee for Complainant and persons entitled to such payments, and was similar to a contract of a purchaser or tenant should pay the purchase money or rent, to the extinguishment of liens.

Story's Eq. Jm. 1215.

Curren *vs.* Arkansas, 15th How. 304.

The trust in equity having existed in favor of Jeffery, the Court will enforce it.

Ib., Sec. 1231.

Curren *vs.* Arkansas, 15 How. 304.

This contract, and the one contained in the charter, gave Jeffery a lien on the Road.

Ib. Fox *vs.* Seals, 22nd Wal., 425.

Fletcher *vs.* Morey, 2nd Sto. R. 555.

Mitchell *vs.* Winslow, Ib. 625.

III.

As to the construction of the act, the Sixth Section is as follows:

"The lien of the mortgages and deeds of trust authorized to be made by this Act, shall be postponed to the lien of judgments recovered against said corporation after the reorganization, for any labor *thereafter* performed for it, or for materials or supplies *there-*

after furnished to it, or *for damages, for losses or injuries thereafter suffered by the misconduct of its agents,* or in any action founded on its contracts or liability as a common carrier, thereafter made or incurred."

In the acceptance of this act of the legislature by Complainant, he agreed, to have the lien of his mortgage postponed to the liens of such judgment as Jeffery's.

Curren *vs.* Arkansas, 15th How. 425.

Fox *vs.* Seals, 22nd Wal., 425.

It is the business of the Court, the Judge to construe the act to suppress the mischief and advance the remedy.

Adm's of Tracy *vs.* Card, 2nd O S. R., 442.

Galveston R. R. Co. *vs.* Cowdry, 11th Wal., 475.

IV.

The sale of the road, nor any other proceedings of the Court below, prior to Jeffery becoming a party thereto, could in no way effect his rights.

Galveston R. R. *vs.* Cowdry, 11th Wal. 475.

Hook *vs* Paine, 14th Wal., 252.

Ogilvie *vs.* Knox Ins. Co., 2nd Black, 539.

Coiron *vs.* Millandon, 2nd Black, 113.

Wolf *vs.* Lewis, 2nd Black, 280.

Bebe *vs.* Russell, 2nd Black, 283.

Craighead *vs.* Wilson, 18th How., 199.

The proceeds of sale were a substitute for the railroad sold: or the judgment creditor could have a re-sale of the road.

Meyers, et al *vs.* Hewit, 16th O. R. 449.

Oleut *vs.* Bynum, 17th Wal. 63.

Porter *vs.* Barclay, 18 O. S. R. 546.

Galveston R. R. *vs.* Cowdry, 11 Wal. 475.

Markley *vs.* Langlay, 92nd U. S. 142.

Moore *vs.* Rittenhouse, 15th O. S. 318.

Lefferson *vs.* Dallas, 20th O. S. R. 63.

At the time of the injury to Zentmeier, his representative had a right of action and an inchoate lien paramount to Complainant's lien; when he obtained his judgment, his paramount lien became absolute.

State Bank of O. *vs.* Hinton, 21st O. S. R. 509.

S. T. CRAWFORD,

For Appellant

APPENDIX FOR BRIEF OF APPELLANT.

Copy of the law regulating reorganization of railroads and under which the Cincinnati, Wilmington & Zanesville Railroad was reorganized, passed by the Ohio Legislature, April 11th, 1861. Vol. 58, Ohio Laws, page 70.

"An Act to regulate the sale of railroads and the reorganization of the same."

SECTION 1.—Be it enacted, etc., that in case two-thirds in interest of the creditors of a railroad company and two-thirds in interest of the stockholders of such company, shall agree in writing, upon a plan for the re-adjustment or capitalization of the debt and stock thereof, then upon judicial proceedings for the sale of the road, under a mortgage or mortgages or a deed or deeds of trust, the Court before which such proceedings may be had, shall proceed to render a judgment or decree against the company for the amount that may then be due and in arrear upon said securities, which judgment or decree shall, from its rendition, become a lien on all the property embraced in such securities and upon all the franchises and powers of said company, including its franchise to be and act as a corporation conferred by the charter and the amendments to the charter of such company, and upon a sale had under such decree and a purchase at such a sale by trustees, on behalf of the parties to such agreement, appointed by said agreement, all the said property so bound by the judgment or decree, including all the said franchises, shall vest in said trustees; provided that every such agreement shall provide that the unsecured debts of the company incurred for repairs or running expenses, shall be paid in money or bonds of the re-organized company, as herein after provided; said

bonds to be of the highest class issued; a copy of the terms of said agreement shall be filed in said Court before the rendition of said decree.

SECTION 2.—That the said trustees shall, as soon as may be, after the sale, call a meeting of the parties to the aforesaid agreement, by a notice signed by a majority of said trustees, or of their survivors, and published not less than once a week, for four weeks, in a newspaper printed in the cities of New York and Philadelphia, and in another newspaper printed in each county on the line of said railroad, specifying the day and place and object of such meeting; the place of such meeting to be on the line of such railroad; that at such meeting, each of the parties to the aforesaid agreement, shall be entitled to vote according to the provisions thereof, but not exceeding one vote for every fifty dollars of the par value of the debt or stock of such party, according to a list of voters and of their respective interests, which shall be prepared by the said majority of the trustees, who are empowered to act as judges of the election; that such meeting by a majority in interest of the persons present, in person or by proxy, shall be competent to retain or change the name of said corporation, to decide, for the time being, the amount of its capital and the number of shares into which such capital shall be divided, to fix the number of directors and their term of office, to elect such directors, a majority of whom shall be residents of the State or States in which such railroad is situated, and to do all things necessary or proper to reorganize said corporation; provided that any creditor shall be entitled to become a party to the agreement aforesaid, either at, or any time before the meeting, in this Section provided for, and any stockholder shall be entitled to become a party to the agreement aforesaid at any time within one year after such meeting.

SECTION 3.—That a certificate, under the common seal of such corporation, specifying its name and the railroad which it is to hold, maintain and operate, shall be filed in the office of the Secretary of State, and that a copy of such certificate, duly authenticated by him, under the great seal

of this State, shall in all Courts and places, be evidence of a compliance with all the conditions and provisions of this Act, and of the due reorganization and of the existence of the said corporation.

SECTION 4.—Upon such reorganization, and a conveyance by the trustees, or of such of them as shall be vested with the legal title, or their survivors, all the railroad and other property and franchises and things purchased as aforesaid, and all the franchises, powers, faculties, privileges and immunities which were possessed or enjoyed by the original company, or by any company with which it had been consolidated, shall pass to and be vested in the said corporation as reorganized; and the same, and all property and things which the said reorganized corporation shall thereafter acquire, except as hereinafter provided, shall be taken, held and disposed of, for the use and benefit of the creditors and stockholders of the said corporation, who shall have become such, upon and after such reorganization, according to their respective rights, but subject to the powers of the said corporation, and shall be in no wise chargeable in respect to any debt, liability, or claim of any creditor or stockholder which subsisted prior to the sale and reorganization herein provided for; but all property of the original corporation not embraced in the said sale, shall, upon the reorganization, be vested in the said corporation as reorganized, in trust for all parties interested therein as creditors, stockholders, or otherwise.

SECTION 5.—That said corporation shall likewise have power, at any time within six months after the reorganization, to assume such debts or liabilities of the original company, and to make such adjustments or exchanges with any bondholders of the original company, and any stockholder within one year, as to the said corporation may seem expedient, and may use for such purpose any bonds or stock which it may be authorized to issue or create; and it shall have power to make and issue said bonds, payable at such times and places, and bearing such rates of interest as it may deem expedient, not exceeding seven per cent. per

annum, and to secure the payment of any bonds which it may issue or assume to pay, by mortgages or deeds of trust of its railroad, or any other of its property, real or personal, and to include therein with its road all its cars and other rolling stock and equipments and any machinery, tools, implements, fuel, materials and all other things then held or thereafter to be acquired, for the constructing, operation or repairing said road, or for repairing or replacing any of its equipments or appurtenances, as part and parcel of said railroad, and as constituting with said road one property, and to include in such mortgages and deeds of trust, all franchises held by said corporation, and connected with or relating to said road, and all other corporate franchises of said company: all which said franchises, including the franchise of being a corporation, in case of sale by virtue of any such mortgage or deed of trust, or of any judgment specified in section six, are hereby declared to pass to the purchasers, so as to enable them to reorganize the corporation in the manner herein provided, and shall also have power to issue capital stock to such aggregate amount as it may deem proper, not exceeding any limit which may be fixed by agreement with the trustees purchasing as aforesaid, and may establish preferences in respect to dividends, in favor of one or more classes of the said stock, in such order and manner as it may deem expedient, not exceeding such limit as may be fixed by agreement as aforesaid, and may, if authorized by the agreement mentioned in Section one, confer on holders of any bonds which it may issue or assume to pay, such rights to vote at all meetings of stockholders, not exceeding one vote for every fifty dollars of the par amount of the said bonds, as may have been provided for in the agreement mentioned in Section one, which rights, when once fixed, shall attach to and pass with such bonds; under such regulations as the by-laws may prescribe to the successive holders thereof, but shall not subject any holder to any assessment by the said company, or to any liability for its debts, or entitle any holder to dividends.

SECTION 6.—The lien of the mortgages and deeds of

trust authorized to be made by this Act, shall be postponed to the lien of judgments recovered against said corporation after its reorganization, for labor thereafter performed for it, or for materials, or supplies thereafter furnished to it, or for damages, for losses, or injuries thereafter suffered or sustained by the misconduct of its agents or in any action founded on its contracts or liability as a common carrier, thereafter made or incurred.

SECTION 7.—Provides that this Act may apply to roads part in and part out of the State, not necessary for the construction.

SECTION 8.—Provides that appraisement may be waived and not important or necessary to construction.

SECTION 9.—Provides for State, county and township stock.

SECTION 10.—Provides that roads that have been sold may be reorganized under this law.

SUPREME COURT OF THE UNITED STATES.

FRANCIS JEFFREY, ADMINISTRATOR OF WILLIAM L. ZENTMEYER, APPELLANT,

VERSUS

CHARLES MORAN, TRUSTEE, APPELLEE.

IN CHANCERY.

No. 51.

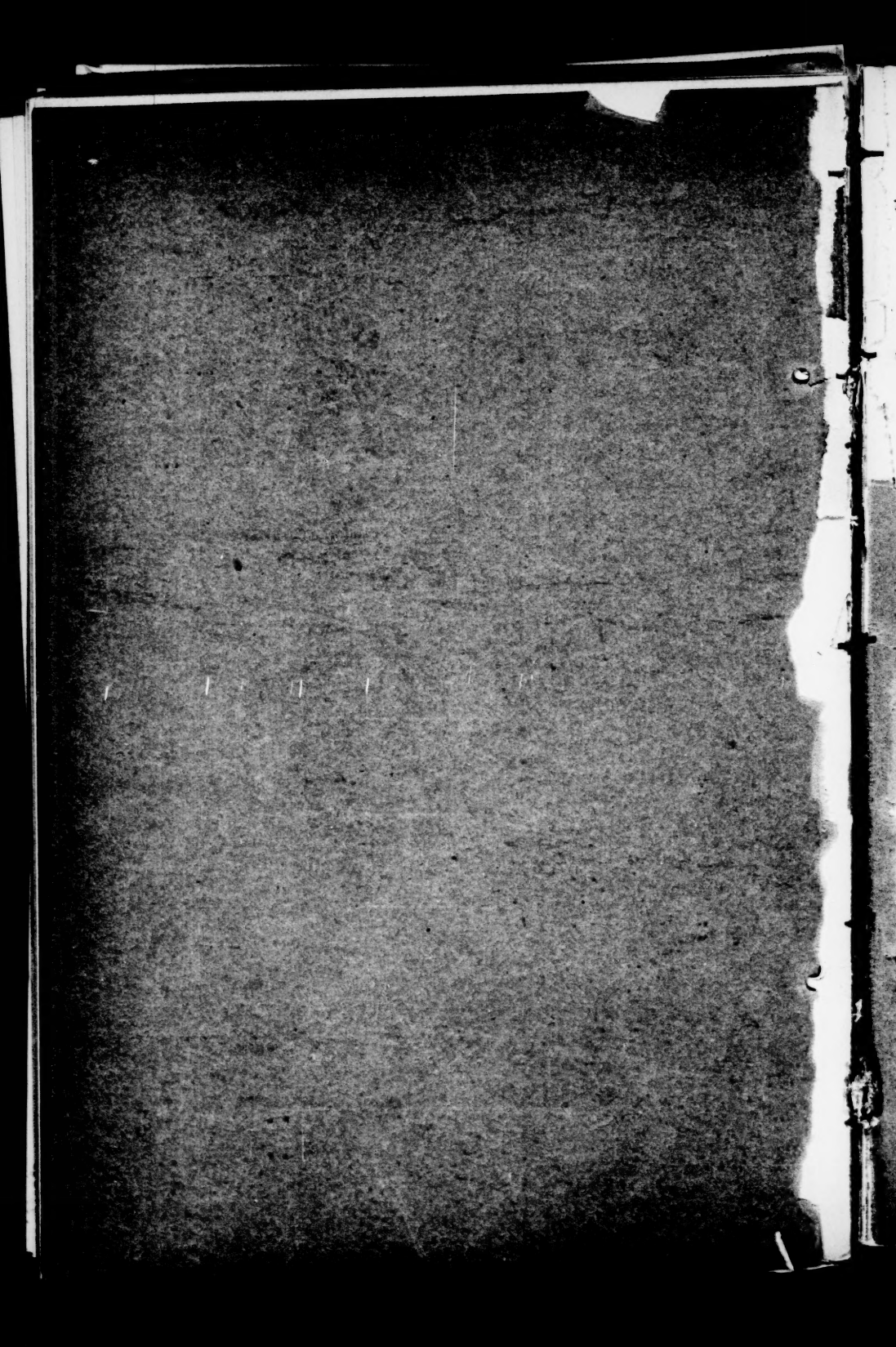
OCTOBER TERM, 1879.

BRIEF ON BEHALF OF APPELLEE,

BY

M. A. DAUGHERTY,

SOLICITOR.



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BRIEF ON BEHALF OF APPELLEE BY M. A. DAUGHERTY, SOLICITOR.

I.

THE RECORD.

The suit in the Circuit Court of the Southern District of Ohio was a suit in chancery by Charles Moran, trustee in a deed of trust, or mortgage, made by the Cincinnati and Zanesville Railroad Company to him and one W. Schall, to

secure bonds of the company to the amount of $1,300,000, and the suit was brought to foreclose this mortgage.

The mortgage sued on was dated April 1, 1864, and it covered the roadway of the company, and all other property, real and personal, and the franchises of the company; and the bonds it secured were payable November 1, 1893, with interest at seven per cent. per annum, payable semi-annually on the first of May and the first of November, at a place named therein; and one of the conditions of the mortgage was [printed record, 16] that "if default be made in the payment of any installment of interest, or any part thereof, on presentation of the proper coupon or coupons therefor, at the time and place at which they are lawfully payable, and shall remain in default for three months thereafter, * * * then * * * the entire principal of said bonds shall, for all purposes whatsoever, become due and payable, and payment thereof may be enforced accordingly in due course of law, with the interest thereon."

The bill for foreclosure was filed April 13, 1869, and in it it is alleged [8] that the interest was regularly paid to and including that due November 1, 1866, but that default was made in payment of the subsequent installments of interest, viz., those due in May and November, 1867, and in May and November, 1868; and the prayer is for the sale of the mortgaged premises, and the payment, out of the proceeds, of the amount found due to the bondholders.

On May 4, 1869, [20] the railroad and its appurtenances, were by the court put into the charge of the officers of the

company as receivers, to be operated under the orders of the court; and on the 23d of September, 1869, a decree *pro confesso* was entered; [21] and on the 6th of October following, [22] a final decree was entered finding the principal $1,300,000 and five installments of interest of $45,500 each, with interest thereon to be due, and requiring the payment thereof within twenty days, or in default, the sale of the premises, prescribing the manner, terms, etc.

December 2, 1869, [27] a sale made the day before was reported as having been made to Thomas L. Jewett at $1,004,000, and on the same day, [29] the sale was confirmed.

In the order of confirmation [30] it is found that the purchaser held $807,000 of the bonds and the unpaid coupons thereon, and of the purchase money there was, therefore, left in his hands in respect of the dividend to which these would be entitled, $562,000, and that he had paid to the special master the residue of the purchase money, $442,000; and the court allows $100,000 of the proceeds to be retained by the master, subject to the further order of the court, to liquidate liabilities, costs, charges, and expenses, which might be legally payable and entitled to preference in distribution, to the claims of the bondholders, leaving $342,000 provisionally applicable to payment of dividends to the holders of bonds and coupons other than the said purchaser.

And in the same order [31] the following clause is found:

"And for all other purposes, except so far as the same are by the former orders herein committed to the hands of the said Charles Moran, as special master commissioner, and especially for the purpose of auditing and receiving evidence in behalf of third persons who may assert claims

or liabilities against the said Cincinnati and Zanesville Railroad Company, other than the mortgage bonds and coupons aforesaid, the said Erasmus Gest [who was president of the company] in his individual capacity, and not as president, be and he is hereby constituted and appointed a special master commissioner in this case, and as such is hereby directed to give notice at least in one newspaper of good circulation, published in the city of Cincinnati, and in each of the counties through which the line of said road passes, of his said appointment, and that he will receive the presentation of claims, in behalf of all persons, against said company with the proofs thereof, at a place to be designated by him, at any time before the fifteenth day of January, A. D. 1870. And he is required to report touching said claims and liabilities, allowing and disallowing the same, to this court, on or before the first day of our next term, and the parties interested are required to file exceptions to said report, or any part thereof, within one month after the same shall be filed."

The appellant has left the Record defective in not bringing up the Report of this special master, who was charged with auditing claims other than those of the bondholders, and the report of the receivers, in which claims are also mentioned, as appears by subsequent orders in the case.

In the Record, as brought up, however, in the decree of distribution [31,] which was made February 18, 1870, we find on page 32, of the Printed Record, the fact, that his Report was made, and also a Report by A. R. Dutton, a special master to pass on the accounts of the receiver, E. Gest, President, as representing the corporate officers in whose hands, as receiver, the road was placed, and also a Report of the receivers; and thereupon the court proceeds to pass on and allow certain claims reported, and to determine the

status of persons holding vendors' liens for real estate who are left to be paid by the purchaser; and reserving in the hands of the complainant, Moran, $11,043.12 for further order, it makes distribution of the rest of the fund in his hands (after paying proper charges thereon) to the bondholders; and then, in the same decree, on page 34, recurring again to Erasmus Gest's Report, the court says:

"And it is further ordered and adjudged, by the court, that the proceeds of said mortgaged premises, in the hands of the complainant, not ordered to be applied as above, or to be distributed to the holders of the said bonds and coupons, *are not, in law or equity*, subject to be paid or applied in payment, upon the claims of any of the following named claimants mentioned and referred to in the receiver's Report, or the Report of E. Gest, as master commissioner, namely: *Francis Jeffries, administrator of the estate of Wm. L. Zentmeyer, deceased*, Harness Renick, Moses Kouns, Geo. W. Pratt, Samuel Dumm, S. H. Guthrie, James Dodds, J. A. Smith, W. H. Wilson, George B. Weaver, Mathias Combs, Alexander Wood, and Washington Brown; it being the opinion of the court that whatever may be the validity and merits of said claims as claims against said company, of which the court does not presume to judge, the said claimants, on account thereof, have not, nor has either of them, any right, in law or equity, to participate in the distribution of said fund. And all questions touching the right of any *other* claimant or claimants, named or referred to in said master commissioner's Reports, to participate in the distribution, on account of their claims in said fund, are reserved for further consideration of the court."

Then, on page 35, in concluding this order, twenty days' time is given *to all parties interested in the distribution of the proceeds of the sale of the mortgaged premises* to except to certain allowances, and if, on hearing of such exceptions, these

allowances are reduced the amount of such reduction shall be added to the reserve fund, part of said proceeds, to be afterwards distributed with any residue of said reserved fund *to the bondholders.*

On page 35, of the Printed Record, is the Report of Moran, of June 8, 1874, as to dividends to bondholders, showing that they had received a fraction over 73 per cent. of the amount due to them, and that after this disbursement, and other payments under the order of distribution, there was a balance of $7,082.26 in his hands.

This Report is followed by one of June 19, 1874, from Erasmus Gest, receiver and special master [36], showing balance in his hands of $1,051.67.

These Reports are, June 19, 1874, followed [37] by an order settling the accounts in them, leaving in the hands of Gest $186.64, which he is directed to pay over to Moran, and finding in the hands of Moran $7,082.26—and as to the disposition of these balances the case is continued.

On the 8th of August, 1874 [38], the appellant, now before the court, filed his motion for leave to file his cross bill, and November 5, 1874, leave was granted, and the bill filed.

THE CROSS BILL OF APPELLANT.

The bill is entitled in the original case, but is alone against the complainant in that case, and no effort has been made to bring in other parties.

1. It recites the institution and character of the original suit for foreclosure of the trust deed to Moran by the C. & Z. R. R. Co., and the decrees, orders, etc., made therein, and the

balance, as above stated, in the hands of the trustee, saying, among other things, that the claims and demands of all parties to the trust have been paid and satisfied except a portion of the claim of Moran as trustee. [This is not correct, as the Record shows.]

2. That the railroad in question was in the first place constructed by the *Cincinnati, Wilmington and Zanesville Railroad Company*, which, becoming insolvent, a mortgage given by it was foreclosed, and the mortgaged premises sold June 10, 1863, to *Moran*, as trustee of the creditors and stockholders; after the sale the company was reorganized as the Cincinnati and Zanesville Railroad Company, under the statute of April 11, 1861, and, on the 12th of March, 1864, Moran conveyed to the reorganized company, and the new company made a mortgage to Moran as trustee, being the one foreclosed in this case.

3. That the latter mortgage—under which, and said deed, said company held and operated said road—provided in its first item that the possession should be held by said company so long as no default was made in payment of the sums secured to said trustee, etc.; and that the directors in prosecuting said business and applying funds, should be deemed to be acting in trust for the grantees of the mortgage and all persons beneficially interested in the security of the mortgage, and any breach of trust should be a breach of the conditions upon which said company was to retain possession; and in item third, that the grantees—the trustees, Moran and Schall—should not be held personally liable for losses, etc.;

and that in said act, under which the reorganization was made, the lien of any mortgage made by said company should be postponed to the *lien of any judgment* that should be recovered against said railroad company, after the reorganization, for injuries thereafter suffered by the neglect, default, or misconduct of its agents.

4. The injury, in 1866, of appellant's intestate, appellant's appointment as administrator, the commencement of his action against the company July 16, 1867, and the recovery of judgment therein February 28, 1871, are set out; and that the judgment, $5,000, and costs, $180.40, remain unpaid; and that the company has no property subject to levy, etc. It is then averred, "that the said judgment, being for damages sustained by the negligence of the agents of said company since the reorganization, and while the same was being operated under said deed and trust mortgage, *was the first* and best lien on said railroad, and is the first and best lien on the said proceeds of the sale thereof, and this respondent is entitled to full payment of said judgment, interest and costs, and interest on said costs before any payment is made of the bonds or coupons."

THE EXHIBITS.

1. The deed from Charles Moran to the Cincinnati and Zanesville Railroad Company, which, reciting the original foreclosure, the agreement for reorganization, among other things, provided [43], "that no act of said body corporate to be done * * * shall impair or affect the priority of lien intended to be secured in behalf of the holders of the firs

mortgage bonds of said original company," and new bonds were to be issued to them for same amount, $1,300,000, to be secured by a first mortgage.

2. The mortgage to Moran, which is an exhibit to his bill.

3. The Record of the action of appellant as administrator against the C. & Z. R. R. Company.

The petition filed July 16, 1867, is under the act giving damages for causing death by any wrongful act, neglect, or default, alleging that his intestate was a locomotive engineer on the road, and June 21, 1866, by reason of the washout of a culvert his train was wrecked and he killed, leaving a widow and children. An answer was filed October 1, 1867, and an amended answer June 17, 1868.

December 30, 1868, a jury was impaneled, trial had, and the jury failed to agree and were discharged.

December 3, 1869, another jury was impaneled and trial had, and verdict rendered for $5,000, which at same term was set aside on defendant paying costs.

The case was continued from term to term until February 28, 1871, when the plaintiff appeared, *the defendant not being represented by counsel*, and thereupon a jury was impaneled and verdict rendered for full amount claimed, $5,000, and judgment accordingly.

[*This was after the company ceased to exist, its property having all been sold December* 1, 1869, *and its business wound up by the orders in the Ciruit Court in February*, 1870, *and no one left to resist this apparently unfounded claim.*]

II.

THE PROPOSITIONS OF APPELLANT.

It appears to us that the best argument in this case is a simple statement of it from the Record as we have given it above, but in deference to the opinion of counsel on the other side we will examine their argument in detail, and try to show that that argument does not disturb the character of the case as the Record presents it.

It should be premised that to the cross-bill of appellant the trustee, Moran, filed a demurrer, which was sustained by the Circuit Court, and the cross-bill was dismissed. To reverse this ruling the appellant comes here.

The question is as to liens—first, whether the appellant ever had any lien, and, second, if so, when did it accrue, and how does it stand as to preference with the lien represented by the appellee, the trustee in the mortgage.

The money in court is part of the proceeds of the sale of the *mortgaged premises*, and being such proceeds, this money is to go to the mortgagees unless some sufficient reason is given why it should go elsewhere.

Counsel for appellant in their printed argument to show that he has a lien, and that that lien is preferable to the lien of the mortgagee state three propositions. The first is as follows:

"FIRST. Because in *fact* the complainant, Moran, and those he represents as mortgagees and bondholders were, at the time of the injury to Zentmeyer, the *actual owners* of the said railroad, and were, in fact, actually *operating* the same, and were actually liable to Zentmeyer for the acts of the said railroad company, their trustee."

The italics are retained as counsel give them.

What foundation is there in the Record for this proposition?

The C. and Z. R. R. Co., the mortgagor, was organized as a corporation under the laws of Ohio. It had stock and stockholders like other railroad corporations. Under the laws of the State it could not borrow money nor make a mortgage for an amount greater than its stock. The reorganizing law of 1861, so frequently referred to by counsel, and which we will have occasion more particularly to examine, did not change the general corporation law in this particular, or in any other except in certain matters hereafter to be noticed.

Here, there were the debtor, the corporation, and creditors, the mortgagees, and, except as modified by positive law or express contract, this relation has, as between them, the same consequences as in cases of other mortgagors and mortgagees.

The act of 1861 was not made to change this relation or to modify the rights and duties arising from it, except only as it, in plain terms, provided.

The railroad enterprise that had for ten years before characterized the history of the State had overstepped the bounds of prudence and built some roads that were not then demanded by the currents of commerce; and these interfering with more legitimate ventures, pulled down the whole system, and almost every road within the bounds of the State was embarrassed, and one after another they were nearly all

foreclosed and sold. The Central Ohio, the Mad River Valley, the Steubenville and Indiana, the Columbus, Piqua and Indiana, the Scioto and Hocking Valley, the Marietta and Cincinnati, and the Pittsburgh, Fort Wayne and Chicago, and many others were, about the same time, brought under the hammer. But persons interested in these several enterprises were not disposed to think that their particular road was the one born out of due time that had caused the mischief, or that, with proper indulgence, could not be made to be remunerative and even profitable. And the subsequent career of several of these roads justified this hopeful view, notably the Central Ohio, the Columbus, Piqua and Indiana, the Mad River Valley, and the Pittsburgh, Fort Wayne and Chicago.

And it was this hope, and the tenacity of stockholders and deferred creditors that induced the passage of the act of 1861, which gave an opportunity for all parties interested to test the capability of the roads to pay off, or at least to carry, the preferred debts and leave something for those behind them; and a decision of the Supreme Court, to which we will have to refer, indicated the time for its passage.

Unfortunately, the Cincinnati, Wilmington and Zanesville Railroad Company, which built the road now in question, did not realize the hopes of those who took part in its reorganization as the Cincinnati and Zanesville Railroad Company. But in this reorganization there were, as in the others, stockholders who formed and managed the corporation, and mortgage bondholders who were simply creditors

having no control of the corporation or its operations. The mortgagees in this case were merely mortgagees, not even having, as the law would have authorized them to have, if they had stipulated for it, the right to vote. This is shown by the mortgage in the Record.

When the first proposition of counsel is thus corrected in its assumption of facts, it is not surprising to find that the authorities cited to sustain it have no relevancy to what is left.

That the property of a corporation is a trust fund for the benefit of creditors and stockholders; and that whatever becomes capital must remain capital; and the cases sustaining these doctrines as cited do not seem apposite when the facts are understood.

The second proposition is equally unsustained by the Record. It is—

"SECOND. Because in the mortgage under which complainant below claims that he is entitled to the proceeds of sale, it was stipulated and agreed that the claim of Jeffrey or *all claims for expenses in operating the road* should be paid out of the proceeds, and complainant agreed to and did waive the lien of his mortgage to the payment of the expenses of operating the road."

It is, perhaps, sufficient to say that there is no such stipulation in the mortgage, or any where else in the case. When counsel in their argument come to specify where this stipulation is found they, on page 8 of their printed argument, quote (imperfectly) Item first of the mortgage from page 15 of the Record, which, in the first place, is intended

simply to define the right of the mortgagor to retain possession, and, in the second place, even as quoted, affects, not the *proceeds of the sale of the road* after the company has been ousted of possession, but the application of the *earnings* of the road while it is in the possession of the company. *This right* is limited in duration "so long as no default shall be made in the payment of the installments of interest," and instead of such application of the earnings being a concession of the bondholders to the stockholders it is put in the mortgage as an obligation on the stockholders to see to it that all expenses, including taxes, shall first be paid before any dividend to them is made out of earnings, and in Item third, on page 16, a failure on their part to observe this obligation is made a breach of the condition of the mortgage. Not only so, but in Item second [15] it is provided: "and it is hereby expressly reserved and limited that it shall not be competent for said company, in the prosecution of said business, to create any lien by contract or otherwise upon any of the property hereby conveyed that shall have priority over the lien of this deed."

Counsel seem to think that the mortgage was made to secure others than the mortgagees. We suppose it was made for the benefit of the mortgagees, and for the security of them alone.

One of the authorities relied on by counsel to sustain this proposition that is not in the case, that of *Lane* v. *Baughman*, 17 O. S. 642, is a very good case indeed, the principal point being that an injunction may be allowed restraining the

removal and sale on execution, of portions of the mortgaged property of a railroad company, on the application of the mortgagees, when the whole of the property mortgaged is admitted to be inadequate security for the payment of the mortgage debt.

It is unnecessary to comment on the other authorities. They are very good law, but they do not fit the appellant's case.

The remaining proposition is:

"THIRD. Because the law under which the said railroad was reorganized and operated, provided that the lien of the complainant's mortgage should be postponed to the liens of judgments obtained against the railroad company for injuries suffered by negligence of any employe of said railroad."

This proposition presents, fairly enough, the very question in the case, namely, has the appellant any lien, and if so, is it a lien preferable to the mortgage lien of the appellee; and this question we propose to consider in the next branch of our argument.

III.

THE ACT OF 1861.

The act of April 11, 1861 (58 Ohio Laws, 70, S. & S. 127), provides:

1. That in case two-thirds in interest of the creditors and two-thirds in interest of the stockholders of any railroad company shall agree in writing upon a plan for the *readjustment*, or *capitalization* of the debt and stock, then upon judicial proceedings for a sale of the road, under mortgage or deed of trust, judgment shall be rendered for the amount due on such securities, *which shall be a lien on all the property embraced in such*

securities, and upon all its franchises and powers, including its franchise to be a corporation; and upon a sale under such decree and purchase by a trustee on behalf of the parties to such agreement, the property and franchises shall vest in him, provided such agreement shall provide that the *unsecured debts* of the company, incurred for *repairs or running expenses*, shall be paid in money or bonds of the highest class issued.

2. After the sale a meeting of the parties shall be held—creditors and stockholders both entitled to vote—which may adopt a name for the new company, decide amount of stock and its division into shares, fix the number of directors and term of office, elect directors, and do all other things needful to reorganize: provided, any creditor may become a party to such agreement at or before the meeting, and any stockholder for a year thereafter.

3. A certificate, specifying the name and the railroad it is to hold, shall be filed with the Secretary of State, and a copy thereof, duly authenticated, shall be evidence of compliance with the law and existence of the corporation.

4. Upon such reorganization and conveyance by the trustee, all the property, franchises, etc., possessed by the original company shall pass to the new; and the same, and all property thereafter acquired, except as hereinafter provided, shall be taken, held, and disposed of, for the use and benefit of the creditors and stockholders who have become such upon or after such reorganization, according to their respective rights, but subject to the powers of said corporation, and shall in no wise be chargeable in respect of any debt, liability or claim of any creditor or stockholder, which existed prior to the sale and reorganization; but property of the original corporation not embraced in the sale, shall, upon the reorganization, be vested in the new corporation in trust for parties interested.

5. The company may assume debts of the old company, adjust with old stockholders within one year; may issue bonds, secured by mortgage, or deed of trust on its property, possessed or to be acquired, as one

property, and all franchises, which shall pass on sale under such security; may issue capital stock, establishing preferences, and may authorize bondholders to vote.

6. The *lien* of the mortgages and deeds of trust authorized to be made by this act, shall be postponed to the *lien of judgments* recovered against said corporation after its organization, for labor thereafter performed for it, or for materials or supplies thereafter furnished to it, or for damages for losses or injuries thereafter suffered or sustained by the misconduct of its agents, or in any action founded on its contracts or liability as a common carrier, thereafter made or incurred.

7. The act is made applicable to railroads partly in another State, whether the corporation is of this or the other State.

8. Railroads and other property mortgaged therewith may be sold without appraisement, the court fixing a minimum.

9. The State or other municipal body, or any trustee, may become party to the agreement of reorganization.

10. Companies before reorganized under capitalization scheme may come under this act.

This act was the sequence of, and its enactment was caused by the decision of the Supreme Court of Ohio in the case of *Coe* v. *C. P. & I. R. R. Co.*, 10 O. S., 372, made in 1860.

In this case it was among other things held:

1. That under the general powers conferred on railroad corporations in Ohio—to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey, at pleasure, all such real and personal estate as may be necessary and convenient to carry into effect the objects of the corporation—the corporation had no power to alienate the franchise to be a corporation, or the franchise to construct and maintain a railroad and receive compensation for the transportation of persons and property, nor any interest in real estate acquired and held, solely and exclusively, for the purpose of such franchise;

2. That after the railroad had been constructed and prepared for use, things requisite for that use, such as locomotives, cars, and the like, not affixed to the land, being acquired by the corporation, are to be regarded as personal property, subject to alienation and liable for debts;

3. That the corporation could not make a mortgage of any property, such as above described, to be subsequently acquired, so as to give it validity, in other manner, or to a greater extent, than an individual owner of personal property.

But in the same case it was further held:

1. That the corporation having a grant of power to borrow money not exceeding its capital stock, at a rate of interest not exceeding seven per cent., and to execute bonds therefor, and to secure the payment thereof by a pledge of the property and income of the company, and by a subsequent grant a like power and the authority to pledge, being expressed to be "by mortgage or otherwise, the entire road, fixtures, and equipments, with all the appurtenances, income, and resources thereof;" under the power thus granted, for the special purpose of borrowing money, the company could not mortgage the franchise to be a corporation appertaining to the individual members of the corporation, but could mortgage the franchise of the corporation to maintain a railroad and receive compensation for the transportation of persons and property, and could mortgage property connected with the railroad and the use of its franchise, whether real or personal, to be subsequently acquired;

2. That the power which the company had to institute a judicial proceeding to appropriate private property, was not transferable, and that the mortgage of the company could give no right to the exercise of such a power, which the provisions of the general law did not authorize;

3. That the execution of a mortgage, by the company, under such special power, would give no exemption of its personal property from a liability which might be otherwise created by its own act or a judicial proceeding, that the execution of a like mortgage upon personal property, by an individual, would not give.

This was a pioneer case in the domain of railroad mortgage foreclosures, and a great many questions were met in its progress, which, at the time, were novel and difficult, although since their frequent recurrence and full consideration have familiarized the profession with them and their solution; and few are left who will properly appreciate the great learning and patient labor brought to the decision of the questions involved. The rulings in it showed the difficulties to be encountered in the numerous foreclosures then imminent, and, at the same time, gave to the unsecured or deferred creditors and stockholders of other like enterprises glimpses of a plan that, while it would reduce the liabilities of tottering companies, would yet give them a chance to escape entire disaster, and probably save something to the less favored classes of persons interested; and this plan was embodied in the act referred to. Its principal objects were:

1. To authorize agreements, by stockholders and creditors of all classes, to settle on a basis for reorganization of insolvent or embarrassed companies, so that the stockholders of the old would have some interest in the new, and so of the unsecured and deferred creditors, while the first lien holders should, at the same time, be as amply protected as the situation permitted. This was generally done about in this way: the old stockholders got about ten per cent. of their old stock in common stock of the new company, the unsecured creditors got, say, twenty per cent. of their claims in the same kind of stock, the third and second mortgage bondholders got preferred stock, say, one fifty or seventy-five per cent., and the other par; and the first mortgage bondholders got, perhaps, as in this case, the full amount of their old bonds in new first

mortgage bonds, dropping overdue interest—which, in this case, was about twenty percent;

2. To authorize the alienation of the franchise to be a corporation and other franchises. So far as the former is concerned, while the act in terms provides for its mortgage and sale, and proceedings in pursuance of the act doubtless divested the old company of it, it still did *not* pass by the judicial sale, and the act itself provides how this is to be acquired, namely, by the incorporation of the stockholders of the new company;

3. To make the railroad and other property of a railroad company an entirety and authorize sale without appraisement, but by a minimum fixed by the court;

4. To authorize the alienation, or mortgage, of property subsequently acquired, so as to prevent the annoyance of having supplies levied on and thereby stopping, or interfering with, the operation of the road.

These are the great purposes and objects of the law, as will be clear to any one who will read it in connection with the elaborately worked out case which gave occasion for its enactment; and all other matters found in it are incidental or subsidiary.

With this glance at the history of the law, there will be no difficulty in understanding the scope and effect of the 6th section, on which the Appellant bases his claim to participate in the proceeds of the sale of the mortgaged premises, or rather to take these proceeds to the exclusion of the mortgagees.

The whole law is drawn with more than ordinary care, and the provisions are couched in language of more than ordinary precision. It is plain that it was framed by a lawyer familiar with the use of the language of the courts.

The section in question provides that the *lien of mortgages*

and deeds of trust made by the reorganized company shall be postponed to the *lien of judgments* recovered against the company for certain classes of liabilities after the reorganization. No preference is given as against mortgages to these *liabilities*, and no preference is given even to *judgments* thereon, but only to the *lien of the judgments*. The *lien* of the mortgages stands with its preference as to all such liabilities, and as to all judgments thereon, except only as to the *lien* of such judgments.

This is not an oversight of the Legislature, but its deliberate act, as shown by other provisions in the same enactment. For when we examine section one we find that certain liabilities of the original company are preferred and the preference is expressed in a very different way: "*The unsecured debts of the company incurred for repairs or running expenses, shall be paid in money or bonds * * * of the highest class.*" Nothing is here said about judgments or the lien of judgments. Such claims are absolutely preferred and must be paid accordingly.

It should be observed, too, that in making this provision in section six, as to the lien of judgments, almost all the liabilities of the new company are embraced—for labor, materials, supplies, claims for losses or injuries, or in any action founded on contracts or liabilities as a common carrier. It would be difficult to imagine any other kinds of liabilities, and it would be equally difficult to imagine that the Legislature proposed to postpone the *mortgage* to all of these, for that would be in effect to postpone the mortgage creditors to

every body else, or, in other words, not only to deprive them of all preference, but actually to make them agree to postpone themselves, to make themselves, by their own solemn act, not *preferred* but *deferred* creditors.

But this is not the correct reading of the section. It applies the same language to mortgage creditors that it does to other creditors. That is as to both, it speaks only of *liens*. It recognizes the *lien* of the mortgage creditors, but postpones it to the *lien* of judgment creditors.

What, then, is a lien?

A lien, in general language, may be defined as that hold or claim which one person has upon the property of another, as a security for some debt due to him. *Schouler's Per. Prop.*, 482.

There are many kinds of liens recognized at law, some of which attach to real estate alone, some to certain kinds of personal property alone, and some to property in general. And in a large and rather indefinite sense we are accustomed to speak of the *equitable lien*, a creature of equity; of the *maritime lien*, which constitutes an important feature of the jurisprudence of shipping; of the *statutory lien*, a designation applied to liens either expressly conferred or largely regulated by statute—besides the *common law lien*, which is the primitive lien in its simplest form—that lien which consists of a mere right to *retain possession* until the debt or charge is paid. *Ib.*, 483–4.

And as to common law liens, whether particular or general,

possession of the thing on which the lien is claimed is essential to its existence. *Ib.*, 494.

By equitable liens we usually mean all such as exist in equity, and of which courts of equity alone take cognizance; and a very common kind is that which exists between vendor and vendee, the rule being that every one who sells property has a lien upon it for any part of the purchase money which is unpaid, against all persons except a purchaser without notice for valuable consideration. Here a sort of constructive trust arises for securing the unpaid purchase money, and to the extent of the lien the purchaser becomes trustee for the vendor, and the burden of proof is upon him to establish a waiver of the lien. *Ib.*, 500.

Among statutory liens may be named mechanics' liens and judgment liens. *Ib.*, 502.

Now, as to judgment liens, their nature and operation are well defined and understood.

That judgment liens are the creation of positive law without which they can not exist, and that they can not survive the law which gives them being, are principles too well settled to be drawn in question. *Corwin* v. *Benham*, 2 O. S. 36.

The lien of a judgment is, in general, coextensive with the territorial jurisdiction of the court that renders the judgment. Therefore, judgments of the general court of the territory were a lien upon all the lands of the defendant situate within the territory. *Roads* v. *Symmes*, 1 O. 281.

Judgments in the Circuit Court of the United States, for the District of Ohio, rendered previous to May 19, 1828, as

well as afterwards, attached as liens upon the defendant's lands throughout the State, the execution laws of the State having been adopted by the court for the regulation of its practice. *Sellers* v. *Corwin*, 5 O. 398.

It is clear that the Legislature, when it spoke of liens in the act under consideration, did not create any new lien nor enlarge or extend the lien to which it referred. It spoke of the lien of a judgment, and in doing so must be understood as referring to the lien established by the Legislature long before, the nature and operation of which are so well given in the above extracts from the Reports of the Supreme Court of the State.

What, then, is a judgment lien in Ohio, when and to what does it attach, and how is its operation limited?

Let the statutes answer:

"The *lands and tenements of the debtor within the county* where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which the judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be siezed in execution." 51 Ohio Laws, 57, Sec. 421 (S. & C. 1064).

"If execution shall not be issued out within five years from the date of any judgment, that now is or may hereafter be rendered in any court of record in this State, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." *Ib.*, Sec. 422 (S. & C. 1067.)

"If upon such return [the appraisement] as aforesaid, it appears by the inquisition that two-thirds of the appraised value of said lands and tenements so levied upon is sufficient to satisfy the execution, with costs, the judgment on which such execution issued shall not operate as a lien on the residue of the debtor's estate to the prejudice of any other judgment creditor." *Ib.*, Sec. 434 (S. & C. 1073).

"No judgement heretofore rendered or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of any debtor, to the prejudice of any other *bona fide* judgment creditor. But in all cases when judgment has been rendered in the District Court or Supreme Court, and a special mandate awarded to the Court of Common Pleas, to carry the same into execution, the lien of the judgment shall continue one year after the first day of the term of the Court of Common Pleas to which such mandate may be directed. Nothing in this subject [section] contained shall be construed to defeat the lien of any judgment creditor who shall fail to take out execution and cause a levy to be made as herein provided, where such failure shall be occasioned by appeal, proceedings in error, injunction, or by a vacancy in the office of sheriff and coroner, or the inability of such officer, until one year after such disability shall be removed." *Ib.*, Sec. 447 (S. & C. 1080.)

There are a few other provisions relating to judgment liens in Ohio, not necessary to be here particularly cited. See S. & C., 381, 383, 387, 520, 618, 1149, 1160, etc.

The principal provisions on the subject are copied fully above, and these show how carefully and fully the whole matter has been legislated upon, and that it is without warrant for any one to say that the reference to a thing so well known and so precisely defined as a judgment lien,

means anything but what the statutes of the State make it to be.

The lien of a judgment is, then, first *on the lands of the debtor*, and not at all on personal property; secondly, only on these lands *within the county* in which the judgment is rendered; and, thirdly, the lien, thus limited, dates from the first day of the term at which the judgment is rendered, except in specified cases.

In the light of the law as thus announced, let us look at the facts in this case, and see what basis, if any, the administrator of Zentmeyer has for a claim to participate in the proceeds of the sale of the road and other property, as an entirety, of the reorganized company, as against the holders of the bonds of that company, secured by a first mortgage, made under and in pursuance of the statute of April 11, 1861.

The sale was made in this case. The suit was brought to foreclose this mortgage, which was executed April 1, 1864, to secure bonds to the amount of $1,300,000, bearing interest at 7 per cent., payable semi-annually, on the first of May and the first of November, in each year after November 1, 1863; and the third Item in the condition of this mortgage provided, in effect, that on default of payment of any installment of interest for three months after it became due, the whole principal should at once become due and payable.

The bill for foreclosure was filed April 30, 1869, and a default was entered September 23, 1869. A decree *pro confesso* was entered October 6, 1869, finding that the condition of

the mortgage was broken and that the mortgage had become absolute—that the railroad company owed thereon the interest coupons due May 1, 1867, November 1, 1867, May 1, 1868, November 1, 1868, and May 1, 1869, each installment $45,500, in all $227,500, with interest on the several installments from their respective dates of maturity, and the principal sum, $1,300,000 (which the court found by the terms of the mortgage became due by reason of above defaults), making the whole amount due nearly $1,600,000.

And thereupon the court decreed that the railroad company pay these amounts, with accruing interest, within twenty days, or in default that all the mortgaged property, with the franchises of the company, be sold.

Default being made in this payment, an order of sale was issued, and on the first day of December, 1869, *the railroad and all the property and franchises of the company* were sold; and on the next day, December 2, 1869, this sale was confirmed.

And when we come to the case made in the cross-bill of Appellant, we find that the injury was sustained June 22, 1866, which was after the reorganization, and more than two years after the reorganized company had executed and issued its bonds, secured by the mortgage. The injury resulted in the death of Zentmeyer, and July 16, 1867, over a year afterwards, the administrator brought suit against the company in Clinton County Common Pleas (the road running through that county), and February 28, 1871—over a year after the sale of the railroad and all the *property and franchises* of the company—recovered judgment against the

company for $5,000, and $118.94 costs; and this judgment it is now claimed is a lien.

On what?

If on the railroad and the other property of the company, they were not in existence, as the property of that company, and could not be reached by the court. They had passed to third persons, with whom in this suit the court has nothing to do.

But of course it did not become a lien on that property, for the simple reason that the property did not belong to the judgment debtor, and a lien is only a means of holding the property of the judgment debtor for the purposes of execution.

It appears to us that right here we must stop. The law of 1861 gives no new character to mortgages made under it. These mortgages have all the force and effect, and give all the preference and priority that any other mortgages give, *except only as is specifically in that law provided.* That provision is very plain. It scarcely needs interpretation—certainly it does not need construction. It professes to affect the mortgages made under it only in one particular. It does not say that these mortgages shall be a snare and delusion to all who accept them, and that, instead of performing the proper function of a mortgage by securing the debts for which they are given, and giving on the mortgaged property a preferred lien for that purpose, they, on the contrary, are to have the effect of *deferring* the claim of the mortgage creditors, postponing them to every one else, and leaving the

mortgagees in a worse condition than if they had no mortgage.

The law has no such language, and no such purpose, and no such scope.

It says: "the *lien* of the mortgages * * * shall be postponed to the *lien of judgments* recovered," etc. If a judgment is recovered against the company in a county where the company has property (real estate) subject to judgment lien, then that *lien* shall have a preference over the mortgage lien on that property—that is, to that kind of lien and to that extent of lien, the mortgage lien is postponed, but to nothing else. The law makes no other exception, and no other preference. In all else it leaves the mortgage just as it would have been if this law had never passed.

This limited concession to others than bondholders could not materially injure the bondholders, under the conditions of the mortgage, which, among other things, provided that [15] "it shall not be competent for said company, in the prosecution of said business, to create any lien by *contract or otherwise* upon any of the property hereby conveyed that shall have priority over the lien of this deed"; and under Item third of the conditions [16] the violation of this stipulation authorized the mortgagees to enter and take possession and foreclose the mortgage. Had, therefore, the administrator in 1866, or in 1867, before default in payment of interest, prosecuted his writ to judgment, while the judgment would have been a lien on the real estate of the company in Clinton county it could not have done the bond-

holders serious harm; for if the lien was not promptly removed by the company the vigilance of the bondholders would have sought the proper remedy by foreclosure, and thus have saved themselves over a quarter of a million of dollars, which, after that date, they allowed to accumulate as unpaid interest, largely because the company did not allow such liens, overriding the mortgage lien, to accrue.

Counsel are wrong in assuming, as they do throughout their argumentation, that reorganization under this law meant and implied that the new company would be as insolvent and irresponsible as the old. The opposite is the true view of the intent and expectation of this legislation —that whereas the old company was insolvent by reason of its liabilities to stockholders and creditors largely outweighing its assets, the new reducing its old stock to perhaps a tithe of its amount, and making up the required amount by converting a large part of its debts into stock, and leaving only the debt of the highest class as a debt, would start on a new career with every prospect, not only of solvency, but of prosperity; and we undertake to say that this was the result, in a large proportion of the cases of reorganization.

The law did contemplate the giving to bondholders in the new organization power to vote as stockholders whenever that was agreed upon in the plan of readjustment; but we doubt if that was ever done in any case, certainly it was not in this. Here the bondholders are merely such—mere creditors, without any power to control the corporation except to coerce payment.

A number of cases cited by counsel show that where a party *has* a lien on property, the sale of the property will not defeat the lien; but the lien-holder, if not a party to the proceeding in which the sale is made, may still enforce his claim against the property, and whether he was such party or not he may follow the proceeds of the sale into court and have his claim satisfied out of the same. There is no doubt of this proposition. The difficulty is that it is not here applicable.

When this property was sold the Appellant had no lien. The doctrine propounded therefore does not aid him.

We know counsel talk much of an *equitable* lien. There is no question of that kind in the case. The lien given by the statute is a legal lien, a statutory lien, as cognizable in a court of law as in a court of equity. He either had, or he had not, a judgment lien as defined by the statutes of Ohio. If he had not that he had no lien. We think we have shown that he had no judgment lien.

In their printed argument, counsel have this curious paragraph, page 5:

"Also that in the mortgage of complainant it was provided that the creditors of said railroad company, in prosecuting said business and applying funds, as aforesaid, for all purposes of said mortgage, *shall be deemed to be acting in trust for the use of the grantees of said mortgage*, and all persons beneficially interested in the security intended to be affected by said mort gage. Thus, we find it actually expressed by the parties, that the understanding and intention of the parties to the mortgage between themselves was: Thatthe corporation called the Cincinnati and Zanesville Railroad Company was a mere fiction, or, at most, a mere trustee or imaginary shield for the mortgagees. In any controversies between the mortgagees and the

corporation, it was convenient and useful to claim that the corporation was a trustee for these mortgagees. But when a creditor of the corporation intervenes, then these beneficiaries are mortgagees of the road and claim priority as such."

The clause referred to is part of the concluding sentence of Item first in the condition of the mortgage [15], and is the end of a sentence, the first part of which we have already quoted: "And it is hereby expressly reserved, and limited that it shall not be competent for said company, in the prosecution of said business, to create any lien, by contract or otherwise, upon any property hereby conveyed, that shall have priority over the lien of this deed."

The collocation of the clause in question should have saved it from any such perversion as that attempted by counsel.

Counsel carefully leave off also the last part of the sentence: "and any breach of such trust shall be a breach of the condition upon which said company is to retain the possession and use of said granted and sold premises."

This Item in the mortgage, if it has any such office or function as that supposed—to make the mortgagees liable for all the acts of the mortgagors—is a queer thing to be found in a *security* for a debt, the terms of which are usually dictated by the mortgagee, the person who is to be satisfied with the security and the form of it before he advances his money on the strength of it.

But there is nothing in that idea. There is nothing new in this Item. It is as old as mortgages and deeds of trust. It is only a mode of expressing one of the conditions of the

mortgage. The *ordinary* condition of a mortgage is to pay the money at a particular time; and on the breach of this the mortgagee may enter. But this is only one of the many conditions that may be inserted—as that the mortgagor shall insure the property, or keep up certain repairs, etc., etc. *Here*, in addition to the ordinary conditions, the condition is that the mortgagor shall use and preserve the property in a particular way, imposing on the company the duties and responsibilities of a trustee, "and any breach of such trust shall be a breach of the *condition* upon which said company is to retain the possession and use of said granted and sold premises."

These conditions, however expressed, or whatever they may be, do not change the character of the instrument. It is still a mortgage, and the *parties* sustain the relation of mortgagor and mortgagee, and no other.

It is well said by Hilliard (1 Hilliard on Mort., 150): "It has been stated (ch. 1) that after breach of the condition of a mortgage, the mortgagor ceases, *at law*, to have any interest in the estate, his only remaining title being that which is recognized in a court of equity alone, and, therefore, *an equity of redemption*. In the language of a recent case, 'even before breach of condition, the mortgage is a conveyance. It is, as between the parties, the present conveyance of a fee, defeasable upon the payment of money or the performance of some other condition.' And more especially 'after the law day is passed, the mortgagee is to be regarded as the owner.' It now becomes necessary, however, to remark further upon this subject, that *only as between the parties* to the transaction

do these results follow from a breach of the condition of a mortgage. It is the well settled modern doctrine that, except so far as the relative rights and duties of mortgagor and mortgagee, between themselves are concerned, or in reference to all strangers or third persons, who may be connected with or interested in the mortgaged estate, *until the mortgagee enters for breach of the condition, and, in many respects, until final foreclosure of the mortgage, the mortgagor remains the owner of the estate and seised of it, while the mortgagee is held to have a mere lien or security.*"

Calling the mortgagor a trustee for the mortgagee, or calling the mortgagee a trustee for the mortgagor which he frequently, as between them, is, (1 *Hill.* on Mort., 391) does not change their relations to each other, or make them any thing else than what they were before. The attempts to fix or define the relation of mortgagor and mortgagee by likening them to parties sustaining different relations to each other, are vain and lead only to confusion. LORD DENMAN, as quoted in 1 *Hill.* on *Mort.*, 180, says: "It is very dangerous to attempt to define the precise relation in which the mortgagor and mortgagee stand to each other in any other than those very words," *Doe* v. *Barton*, 11 Ad. & Ell., 314.

The entire effort of counsel to give the law of 1861 a construction favorable to the claim of Zentmeyer's administrator, is, by a system of hermeneutics unknown to Dr. Lieber. It is first to assume facts neither admitted nor proven, and then on these assumptions to frame a theory that cannot stand without them. If they would look to the history of the law

and its great object as developed by that history, the fallacy of their leading idea that every thing was done against the interests of the first mortgagees would be obvious even to themselves.

IV.

THE EFFECT OF COMPLAINANT'S DECREE.

But again there stands in the way of Zentmeyer's administrator's claim to participate in this fund, required to satisfy the bondholders and not sufficient for that purpose, the fact that long before his claim was reduced to judgment the bondholders had come into court and procured a decree establishing and fixing their rights; and not only so, but had had those rights consummated by, in effect, getting possession of the fund, the proceeds of the property on which their original right, simply as a lien, was placed. And some force and effect must be given to this fact.

In *Myers, Fall & Collins* v. *Hewett*, 16 O. 449, it is, we know, held that a decree of foreclosure does not create or give rise to a lien of the decree as a judgment on land that will override a senior judgment lien, not levied within the year; but neither in that or any other case that we know of is it held that such decree does not take the mortgaged property, and, after sale and confirmation, the proceeds thereof, out of the category of property that may thereafter be subjected to a judgment lien in favor of a party who before had no lien on the property although a right to acquire a lien by judgment.

And it is to be observed in this connection that the law

under consideration—the act of 1861—in section one gives, by express terms, a lien to such decree not only on the property embraced in the mortgage but also on the franchises of the company. The language of the statute in this respect is: "which judgment or decree shall, from its rendition, become a *lien* on all the property embraced in such security, and also upon all the franchises and powers of said company, including its franchise to be and act as a corporation, conferred by the charter and the amendments to the charter of such company."

It may be said that this language applies only to a judgment rendered under the agreement of readjustment or capitalization; but we think an examination of section 5 makes it equally applicable to the judgment or decree of foreclosure in this case, being on a mortgage made by the reorganized company under that section, as to which it is, in that section said: "all which said franchises, including the franchise of being a corporation, in case of sale by virtue of any such mortgage or deed of trust, or of any judgment specified in section 6, are hereby declared to pass to the purchaser," etc. That is, precisely the same force and effect is given by this section to a judgment *on such mortgage* as is given in section 1 to judgments and decrees under the agreement for capitalization: "which judgment or decree shall from its rendition become a lien on all property," etc. The legislature takes this mode of giving force and effect to a foreclosure under this law, whether of a mortgage of the original company or of the organized company, giving to

the judgment or decree of foreclosure, what, perhaps, it had not before, a lien on tangible property and intangible rights, and thus holding them for the execution. This seems necessary to work out the object of the legislature. And the matter is rendered still clearer by the fact that in the language of the act a decree of foreclosure is associated with the term judgment.

We say, therefore, that the decree of foreclosure in this case had, as to lien, all the force and effect of a judgment, and more; and if there was no other objection to the priority claimed by Zentmeyer's administrator, the fact that this lien is prior in time makes it stronger in equity.

Speaking of judgment lien and equity, we are reminded that counsel for Appellant, on page 17 of their printed brief, say, referring to the case of *Lefferson* v. *Dallas*, 20 O. S., 68, that "the case last cited above shows that judgment liens are highly favored and rigidly enforced in Ohio;" and although somewhat out of place we can not forbear to say, with due deference, that neither that case nor any other in Ohio shows any such preference or favor for judgment liens. That was a case in which a lien existed by the clear language of the statute, and it was enforced in equity. Very early in the judicial history of Ohio a very different doctrine from that claimed by counsel was announced by the Supreme Court, and that doctrine has never been departed from. In the case of *Miami Exporting Company Bank* v. *Turpin*, 3 O. 514, it was held that a judgment creditor can not come into equity to set up or enforce the judgment lien

against the real estate of the debtor who dies after judgment, *the existence of the lien, and the method of enforcing it, being purely legal matters.* This case was decided in 1825; and in 1872 the same court held:

"Where one of the parties in a proceeding in partition, during the pendency of the case, assigned to several persons specified amounts of his share of the money to be realized from a contemplated sale of the land, and afterward a creditor of the same party obtained judgment against him and levied an execution on his undivided interest in the land, who at the same time proceeded by cross petition to subject such interest to the payment of the judgment, and the proceeding in partition resulted in a sale of the land: 1, the lien acquired by the judgment creditor on the interest of the debtor in the land was divested by the sale in partition, and his equitable right to that portion of the proceeds of the sale belonging to the debtor, having accrued after a part thereof had been assigned by the debtor, is subordinate to the rights of the assignees, and in the distribution of the fund the amount assigned to them must be first paid; 2, the debtor had the same right to the statutory exemption in lieu of a homestead, as against the creditor, that he would have if the creditor had levied an execution on the money in dispute; and the court having control of the fund, on the proper application of the debtor, may, in the distribution of the fund, refuse to apply the amount of such exemption to the satisfaction of the judgment." *Comer* v. *Dodson*, 22 O. S. 615.

If the judgment lien is once fixed, and is in no way lost, a court of equity will enforce it just as a court of law would, and in no other way, either as to the property to which the lien attached or its proceeds after sale. But because a party has a right to acquire this legal lien and fails in so doing, is no reason why a court of equity should erect the claim into an equitable lien, which it is not.

V.

RES JUDICATA.

The claim of Appellant was, with a number of similar claims, presented to the Circuit Court in the progress of this case, and payment urged, which was refused.

In a Report made in this case by E. Gest, special master, January 29, 1870, the claim of Jeffrey, administrator of Zentmeyer, was, with other claims, brought to the attention of the court; and afterward when the Court came to make distribution of the proceeds of the sale, February 18, 1870, the Court considered and passed upon this claim and the other claims so presented, and so far from reserving any fund for its payment, as intimated in the cross-bill [41–2], declared it was not entitled to participate in the fund.

How the administrator appeared, whether before the master only, or before him and in court both, is not shown, nor is it important. At the time of the commencement of the suit for foreclosure clearly Zentmeyer's administrator had no lien, and therefore, he was neither a necessary or proper party, and he was not made a party; but as before stated in the abstract of the Record herein given, the Court [31] referred the case to E. Gest as special master, "for the purpose of auditing and receiving evidence in behalf of third persons who may assert claims or liabilities against the Cincinnati and Zanesville Railroad Company, other than the mortgage bonds and coupons aforesaid," and he is "directed to give notice at least in one newspaper of good circulation, published in the city of Cincinnati, and in each of the coun-

ties through which the line of said road passes, of his said appointment, and that he will receive the presentation of claims in behalf of all persons against said company, with the proofs thereof, at a place to be designated by him at any time before the fifteenth day of January, A.D. 1870. And he is required to report touching said claims and liabilities, allowing or disallowing the same to this Court on or before the first day of our next term, and the parties interested are required to file exceptions to said report, or any part thereof, within one month after the same shall be filed."

On the same page of the Record commences the next order in the case, made February 18, 1870, in which [32] the master's Report is referred to, and claims reported therein to the amount of $3,541.02 are directed to be paid by him out of funds in his hands (which were earnings and not proceeds of sale), which claims are particularly described in the order, and the residue of the funds in the hands of the receivers [Gest and other officers of the company], are so far as necessary authorized to be applied to indemnify sureties for the company, and other proper objects; the order then declares that the purchaser of the road must pay balances due on purchase of real estate; and the Court reserving in the hands of the Complainant, MORAN, $11,043.12, for contingencies then impossible to be foreseen or settled, and being of opinion that the proceeds in his hands are not amenable in equity to be charged with the payment of any of the claims against the company, other than such as are above named and referred to, and for which provision is made as above,

out of the funds in the hands of the receivers, proceeds to make distribution of the balance of the proceeds of sale to the bondholders and for expenses; and then recurring again to the Report of the master, the order proceeds as follows [34]:

"And it is further ordered and adjudged by the court that the proceeds of said mortgaged premises in the hands of the complainant not ordered to be applied as above, or to be distributed to the holders of the said bonds and coupons, are not in law or equity, subject to be paid or applied in payment upon the claims of any of the following named claimants, mentioned and referred to in the receivers' report, or the report of E. Gest as master commissioner, namely: Francis Jeffries, administrator of the estate of Wm. L. Zentmeyer, deceased, Samuel Dumm, S. H. Guthrie, James Dodds, J. A. Smith, W. D. Wilson, George B. Weaver, Mathias Combs, Alexander Wood, and Washington Brown; it being the opinion of the court that whatever may be the validity and merits of said claims as claims against said company, of which the court does not presume to judge, the said claimants on account thereof have not, nor has either of them any right in law or equity, to participate in the distribution of said fund. And all questions touching the right of any other claimant or claimants named or referred to in said master commissioner's reports, to participate in the distribution on account of their claims in said fund, are reserved for the further consideration of the court."

The court seems to have proceeded very cautiously in disposing of these various claims, allowing some, rejecting others, and still reserving others for further consideration.

It was certainly entirely competent for the court in this way to dispose of any and all claims on the fund it was administering; and it having in this express and solemn manner disposed of this claim of the administrator of Zentmeyer,

it is not now to be presumed that the action thus taken was without the appearance of the party interested.

In thus holding, the court, we insist, gave construction to the statute of 1861, and held, as we now hold, that the administrator had not, as against the lien of the mortgage, any claim on the fund in question, the proceeds of the sale of the mortgaged premises, nor even on the balance of the earnings in the hands of the receivers, because he had not procured a judgment *lien*, to which alone under that law the lien of the mortgage bondholders were to be postponed—that the *claim* or *liability*, as such, had no lien, but only a judgment thereon, and that not while there was property belonging to the judgment debtor subject to lien.

We may, perhaps, be permitted to state, what does not appear in the Record by reason of important parts of the case not being brought up, that the other claims rejected at the same time as that of Appellant, are, in the aggregate, of larger amount than his.

VI.

CONCLUSION.

In conclusion, and to recapitulate, we claim:

First. That the Appellant never had a lien on any property of the railroad company; that the only lien it was possible for him to acquire was a judgment lien, and that he never acquired that, because at the time of his judgment the debtor had no property, and it was as a corporation extinct, all its franchises as well as its property having been divested by the decree of foreclosure and sale thereunder;

Second. That the lien of the mortgage was a paramount charge on all the mortgaged property subject to be postponed only to judgment liens for certain classes of liabilities reduced to judgment before foreclosure and sale of the mortgaged property;

Third. That the decree of foreclosure was itself a lien of equal, if not greater force and effect than any ordinary judgment on the favored classes of liabilities, and being prior in time it is stronger in equity;

Fourth. That the sale under the foreclosure removed all the property of the debtor company from the category of property subject to a judgment lien; and

Fifth. That the matter of the claim of the Appellant had been, long before he filed his cross-bill herein, passed upon by the Court in this case, and that therefore, under the rule of *res judicata*, being the same claim, presented by the same person, and in the same right, it can not, in this way, be again presented for the action of the Court.

We wish to add only that this litigation is all that stands in the way of a final settlement of a trust that has been in Court now over ten years, accumulating costs and expenses which are properly chargeable to the trust, and that if, for any reason, the demurrer in this case should be overruled the result would not probably benefit any one to any great extent, as the other claims, rejected as above stated, so far as the Record shows, stand on quite as advantageous ground as that occupied by the Appellant.

M. A. DAUGHERTY,
Solicitor for Appellee.